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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO. 357.

THE COLUMBIA MILL COMPANY, APPELLANT,

vs.

WILLIAM W. ALCORN AND JAMES ALCORN, TRADING AS W. W. ALCORN & COMPANY, APPELLEES,

APPEAL FROM CIRCUIT COURT OF UNITED STATES FOR EASTERN DISTRICT OF PENNSYLVANIA.

Brief and Argument for Appellant.

P. H. GUNCKEL,
COUNSEL.

Supreme Court of the United States.

COLUMBIA MILL COMPANY,
Appellant,

vs.

WILLIAM W. ALCORN AND JAMES ALCORN, Trading as W. W. ALCORN & COMPANY,
Appellees.

IN EQUITY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF AND ARGUMENT FOR APPELLANT.

On the hearing below the Circuit Court found and decreed as follows, (40 Fed. Rep. 676), to-wit:—(Butler J.):

> "The plaintiff claims an exclusive right to the word 'Columbia' in brands for flour barrels; and charges the defendant with violating this right, and also with imitating his brands in which the word is used."
>
> "We do not think he is sustained by the proofs. The exclusive right claimed is not satisfactorily shown. The word 'Columbia' is popular, and in common use for many purposes. That it should have been adopted long ago in branding flour barrels is quite probable; and the testimony seems to show that it was, both in the eastern and western sections of this country. If it be said the defendant's testimony in this respect, is not as full as it might be, the same may be said of the plaintiff's. The defendant went far enough to put the plaintiff to further proof. No more need be said respecting this branch of the case."
>
> "Flour brands are so numerous (nearly every miller and dealer having his own) and the general shape and style so similar in consequence of their use on similar packages (barrels) that purchasers must necessarily observe them with some care to distin-

guish one from another; a passing glance cannot be relied upon, and we must suppose it is not. In this respect the case differs from those in which trade-marks are ordinarily involved. Looking at the plaintiff's brand and that of the defendants', which is said to resemble it, with the attention necessary to discriminate between the thousands of flour brands in common use, the difference must be seen immediately, even by the most inattentive buyer. The two or three witnesses who say they were misled must have been especially unobservant."

"The bill must be dismissed with costs."

Appellant contends that the finding and decree below should have been for complainant; because, first, the complainant showed itself fairly entitled to the exclusive use of the word "Columbia" as a trade-mark or brand for spring-wheat flour; and, second, because the complainant showed it was rightfully using the flour-brand in question (whether the right was exclusive or not), and that the defendants were using it unfairly and to the injury of complainant's trade.

It is thought the court may have led itself to erroneous conclusions on the question of exclusive right by giving undue weight to probabilities and possibilities, as may be fairly inferred from its expressions, as follows:— "The word 'Columbia' is popular, and in *common use for many purposes*. That it should have been adopted long ago in branding flour barrels is *quite probable*; and the testimony *seems to show* that it was, etc."

And that upon the question of simulation of brands lawfully used by complainant and the consequent interference with its trade, the court, it is believed, arrived at an erroneous decision presumably because of its holding, that; "Flour brands are so numerous * * * that purchasers must necessarily observe them with some care to distinguish one from another; a passing glance cannot be relied upon; and we must suppose is not. In this respect the case differs from those in which trade-marks are ordinarily involved." And concluding the court said: "The two or three witnesses who say they were misled must have been *especially unobservant.*"

Quære: Is it not largely for the protection of the unobservant and incautious that courts enforce trade-mark and analogous rights?

1.

DEFENDANTS' SIMULATION OF COMPLAINANT'S BRAND.

Dropping for the present the question of exclusive or technical trade-mark, what is the showing as to simulation of complainant's brand and unfair interference with its trade?

The Bill (paragraph 1) shows, that the complainant is engaged in manufacturing and selling flour; that its sales of flour are made largely through agencies at Philadelphia and other Eastern markets; that it manufactures its flour from grain known as hard spring-wheat, by the system known as the "roller process," and applies distinctive arbitrarily-selected names or brands or trade-marks to the packages containing its flour, and sells it under and by such names or brands; that its flour is put up for market in the usual sacks and barrels, and the brands are applied thereto by printing or stenciling, and that it so applies and has for five years or more prior to the year 1888, continuously applied to its flour the word "Columbia" as a fanciful or arbitrary name or trade-mark to designate flour of its manufacture, by printing or stenciling the same as a brand on the sacks and barrels containing the flour—the word "Columbia" usually appearing in a horizontal line in red color, surrounded by a circle formed of the words "Columbia Mill Co., Minneapolis, Minn.," in blue color and the words "Roller Process" and "Patent," also in blue color, in the lower semi-circle; and (Paragraph 2) that the complainant and its agents have during said period, designated and identified and made known to flour dealers and consumers, its flour, by the name or trade-mark "Columbia;" and that by reason thereof and the excellent quality of its flour so branded the same has become widely and favorably known in both local and general flour markets throughout the country by the name "Columbia," and commands an extensive sale at Philadelphia, and elsewhere.

And (in paragraph 3) charges that the defendants, wilfully disregarding complainant's rights, in the years 1887 and 1888, wrongfully offered for sale and sold, and still offer for sale and sell, at Philadelphia and elsewhere, an article in imitation of the complainant's flour, which, with intent to deceive and defraud the public and the buyers and consumers thereof, the respondents sell in packages similar to the complainant's and under the name or brand "Columbia," and that purchasers and consumers thereof were and are deceived and misled into buying the same in the belief that it was flour of complainant's manufacture; and (in paragraph 4) that they have used and are using several slightly different brands in imitation of the complainant's, in all of which brands the word "Columbia" is a constituent part, and the words and figures in connection with which it is used are such that the simulated brands are calculated to deceive purchasers and consumers, and actually have misled and do mislead purchasers to buy the respondents' flour in the belief that it is the complainant's; and that one of the brands so used by the defendants contains only the words "*High Grade*," in the upper arc of a circle; and "No. 1 *Hard Wheat;*" "*Columbia;*" "*Patent;*" and "196," on horizontal lines thereunder; and the words "*Minneapolis, Minn.*" forming the lower arc of the circle; that such brand was and is calculated to deceive the public, and the purchasers and consumers of complainant's flour, and actually has misled and does mislead many of them to buy flour so sold by defendants in the belief that it was complainant's flour.

The answer admits that the defendants are co-partners and carry on business in Philadelphia; and, "that they are receivers of flour, selling on commission flour consigned to them, and are also purchasers on their own account; that, as is the custom of the trade, they put their own brands on the flour, or have the mill from which they receive the flour, brand it as they desire; and that the flour handled by them is put up, as all flour is, in sacks and barrels, and is branded in the usual way, by printing on the sack and stenciling on the head of the barrel." And, after denying (in paragraph second) complainant's right to the name "Columbia" as a trademark, admit that they have sold and still sell flour put up in sacks and barrels with various names and designs; and that one of the brands so used by them is (as alleged in the bill) in the form of a circle having the words "*High Grade*" in the upper arc, and under those "No. 1;" and on the next line "*Hard Wheat*," and under these in large letter "*Columbia*," under that in letters of the same size the word "*Patent*," and under that the figures "196," and in the lower arc the words "*Minneapolis, Minn.*"; that the flour so branded is branded at the mill at the defendants' request, and that they assume the responsibility therefor; but aver that the brand they use is black.

EVIDENCE IN SUPPORT OF THE BILL.

In support of the allegations that are not directly admitted, the complaint shows:

FIRST. By the testimony of its manager, (Zeidler, Q. 6) the use of the word "Columbia" as a brand for its flour since about January 1st, 18[illegible]3; that within the period since the adoption of the brand complainant has used it on an aggregate of several millions of sacks and barrels of flour (Q. 9), of which 250,000 and more were sold in Philadelphia, and as many more in New York City (Q. 11); that its local agents, Linnard & Gibbs, of Philadelphia, sold of this about 30,000 barrels Linnard (Q. 86), or 45,000 packages, sacks and barrels, Delaney (Q. 103). In addition to these sales, the Eastern agent, H. S. Wade, sold in the same and other Eastern territory, several hundred thousand packages, Wade (Q. 23 and 24). As to the reputation of and demand for complainant's flour in Philadelphia and vicinity, see the testimony of Zeidler (Q. 12), Wade (Q. 26), Holmes (Q. 79), Linnard (Q. 85), Perrin (Q. 116–117), Smith (Q. 175); and the defendants' witness, Brook, a Philadelphia flour dealer, (Q. 6.)

SECOND. Upon the question as to whether the flour of the two parties is sold in competition, and whether it reaches the same class of dealers and consumers, it is shown by the testimony of complainant's witnesses, Zeidler (Q. 14–15); Wade (Q. 29); Linnard (Q. 93); Delaney (Q. 108); Perrin (Q. 129); Smith (Q. 181-3); Carrol (Q 274, 277, 282, 286); Runyon (Q. 342); Gilbert (Q. 416 and 422); and defendants' witness, Schwarz (Q. 6–8); and Liebhauser (Record pp 161–4), and it is, in substance, admitted by Samuel Alcorn (Q. 43–6); that not only was the *class* of customers the same, but also that, *in a number of instances, the individual customers were the same.*

THIRD. The use by the defendants of the alleged imitative brand being admitted by the answer, admitted in the defendants' testimony and established by complainant's proofs, the complainant sought to show: 1st. That such brand is *calculated* to *mislead* and deceive ordinary purchasers and users of flour so branded, and, 2nd. That such use has *actually misled* and *deceived* purchasers and consumers.

That the defendants' brand was calculated to mislead, or was capable of misleading purchasers is testified to by Zeidler (Q. 18); Perrin (Q. 127-9); Smith (Q. 224); on behalf of complainant, and is virtually admitted by defendants' witnesses, Pyle (Q. 9); and Webster (Q. 16). As to the other witnesses who testified on behalf of defendants upon this question, it would appear from the various interrogatories put to them that the inquiry was thought by their counsel to relate to the question, as to whether the witnesses themselves, or others who were flour dealers or extensive users, would be deceived, and the answers elicited refer principally to the supposed effect of the alleged simulated brand upon the minds of experts or persons who would be expected to exercise more than ordinary caution in buying flour. Such, however, was not the inquiry relative to which expert testimony would be of weight. The real question to be determined is, whether the similarity of the brands is such that the public—ordinary purchasers and consumers—the incautious and unwary—would be likely to be misled.

THE LAW UPON THIS SUBJECT.

It was said in *McLean vs. Fleming*, 96 U. S., 245.

> "What degree of resemblance is necessary to constitute an infringement is incapable of exact definition as applicable to all cases. All that courts of justice can do in that regard is to say that no trader can adopt a trade-mark so resembling that of another trader as that *ordinary purchasers* buying with ordinary caution are likely to be misled."

And that:

> "Where the similarity is sufficient to convey a false impression to the public mind, and is of a character to mislead and deceive the *ordinary purchaser* in the exercise of ordinary care and caution in such matters, it is sufficient to give the injured party a right to redress." (Citing *Amoskeag Manufacturing Co. vs. Spear*, 2 Sand. S. C., 509; Coddington's Dig., 109; *McAndrew vs. Bassett*, 4 DeG. J. & S., 380.)

And again that:

> "Two trade-marks are substantially the same in legal contemplation if the resemblance is such as to deceive an *ordinary purchaser*, giving such attention to the matter *as such a purchaser usually gives*, and to cause him to purchase the one supposing it to be the other." (Citing *Gorham Co. vs. White* 14 Wall., 528.)

In *Croft vs. Day*, 7 Beav., 84; R. Cox, 649, the Master of the Rolls says that the test is, whether the public—"*the ordinary run of persons*"—are likely to be misled.

In *Glenny vs. Smith*, 2 Drew & Sm., 476; 11 Jur. N. S., 964: "It is not a question whether the public generally, or even a majority of the public, is likely to be misled; but whether the *unwary, the heedless, the incautious portion of the public would be likely to be misled.*"

Browne on Trade-Marks (2d Ed.) Sec. 33, says:

> "It is sometimes the case that names of articles are of a character to mislead and deceive, they being *idem sonans* in the usual pronunciation; or the form of the package, general appearance of the wrapper, color of label, wax impressions on the top of the box containing the goods, are well suited to divert the attention of the buyer from any critical examination, and the courts do not require a critical examination."

And see:

Leather Cloth Co. vs. Am. Leather Cloth Co., 11 H. L. G., 523; 35 L. J. Ch., 53.

Walton vs. Crowley, 3 Bl. C. C., 440; R. Cox., T. M. C., 166.

McCann vs. Anthony, 38 O. G., 333.

Upton on T-M., pp 215-217.

Celluloid Manufacturing Co. vs. Cellonite Manufacturing Co., 32 Fed. Rep., 94.

FOURTH. It is not material that purchasers from the defendants' would not have been deceived if there is a likelihood that small dealers and consumers who purchased from the defendants' customers might be misled.

> "It is no defence that the marks of the spurious goods, or the words of the jobber who sells them to the retailers, inform those who purchase that the article is spurious or an imitation. Such knowledge on the part of the immediate purchaser is no defense." Browne on T-M., Sec. 496. (See authorities there cited.)

It was said in *La Page Co. vs. Russia Cement Co.* (2 C. C. A., pp. 555-8) that:

> "The case at bar will be found to turn on the facts that the label or mark used in this case, so far from being inapt to deceive subsequent purchasers, necessarily tended, under the circumstances, to mislead the public, including subsequent purchasers, and also that persons of ordinary intelligence, honestly considering the natural results, must have foreseen that they would so mislead. It is however, the law that the fact that the immediate vendees of one who infringes are themselves not deceived is ordinarily of no consequence; and the offense is none the less because the original vendors and vendees may all be parties to the fraud. *Witherspoon vs. Currie*, L. R. 5 H. L., 508, 518, cited and approved in *Lawrence Manuf'g Co. vs. Tennessee Manuf'g Co.*, 138 U. S., 537, 11 Sup. Ct. Rep., 396."

And see:

Sykes v. Sykes, 3 Barn. & Cr., 541; 6 D. & R., 292.

Taylor v. Carpenter, 2 Sand. Ch., 603; R. Cox. 45.

Chappel v. Davidson, 2 K. & J., 123; 8 DeG. M. & G., 1.

"Even if the wholesale buyer is not misled, but the small retailer or consumer is, the right of action exists."

Dixon Crucible Co. v. Guggenheim, 2 Brews., 321, R. Cox., 559.

Clark v. Clark, 25 Barb., 76; R. Cox., 206.

Williams v. Brooks, 50 Conn., 278; Am. T-M. C., 654.

Fifth. But the best proof that the defendant's brand is calculated to mislead, is that it *actually did mislead purchasers*. This is shown by the witnesses Gilbert, Staib and Liebhauser.

Gilbert, a baker at Wilmington, Deleware, after testifying that he had used flour of both parties, was asked, (Q. 384): "When you bought the first flour of defendants that was branded with the word 'Columbia' what make of flour did you understand it to be?" A. "Well, I thought at first when they said 'Columbia' it was the real 'Columbia.'"

J. G. Staib, also a baker at the same place, was asked, Q. 420): "When you bought the flour from them that was branded as 'Columbia' were any representations made to you as to where it was made?" A. "No, sir; same as the 'Columbia' flour, that is all I know. I didn't know there was any difference; I did not know any difference; the brand of flour was a good brand, and he just named such and such a flour at such a price." Q. 421. "When you bought the first time, what flour did you suppose it was—what make of flour?" A. "I never could tell you that up to this day; I looked over the brand; I did not work myself at nights; all I did was to look over it and saw it was 'Columbia'; that is all I looked at—the Columbia name." C. Q. 430. "Mr. Staib, the flour which you purchased from Alcorn & Company was branded 'Columbia Patent' wasn't it?"

A. "I could not swear to it, because I never knew whether it was 'Columbia,' or 'Columbia Patent.'"

A. J. Liebhauser, a baker at Newark, and witness for respondents, testifies that he used a good deal of complainant's 'Columbia' flour, and also bought some of defendants' flour from James Carrol branded 'Columbia Patent'; that he bought the latter for twenty-five or fifty cents a barrel less than the other, and says further (A. to Q. 15); "I was * * getting spring wheat flour of Carrol and spring wheat flour of Smith. I did really buy it thinking it was as good a flour as the Columbia Mill flour. I thought it was a flour that came from the same mill, but under a different brand, but after I had seen the flour I was satisfied it was not the same flour." Q. 18. "Did you ever say to Mr. Smith that Mr. Carrol represented it to you as the flour made by the Columbia Mill Company?" A. "I can't really say; he said it was 'Columbia' flour made in Minnesota; I forget whether the black brand is branded 'Minnesota'; that is how the flour was sold to me--Columbia Mill flour, branded 'Minnesota'; I am satisfied it was not the same flour or the same mill; I am satisfied of that." C. Q. 8. "When you purchased the 'Columbia' flour from Mr. Carrol, which was made by Alcorn, what made you think that it was the same flour as you had been purchasing under the name of 'Columbia' from Smith?" A. "Because it was 'Columbia'; because it was branded 'Columbia.' It was the flour I had been using right along—'Columbia'—and I thought as long as you have got that flour, I might as well buy it of him. Of course, after I opened the flour I could tell it was not the same flour, and was a different manufacture."

These witnesses, as it would seem from their testimony, were fair representatives of the average class of purchasers, and it is apparent from their testimony that they were confused by defendants' brand and

bought their flour believing it to be complainant's, and discovered the mistake afterwards.

SIXTH. And there is also testimony tending to show interference with complainant's business and loss of custom by reason of the use of the imitative brand by defendants. Ziedler (Q. 14) says "it caused dissatisfaction with complainant's agents and interfered with the sale of the flour." Wade (Q. 29) says "it caused the agents to take less flour and the sales fell off about one-half." Linnard (Q. 108) says "both cater to the same trade." Delaney, a salesman for complainant's flour (Q. 108) says "it has interfered to a certain extent." Perrin (Q. 129) complainant's New York agent, says "the offering of flour under the same name at lower prices interfered with his trade." Smith, complainant's agent at Newark (Q. 181-183), says that "by reason of the interference he took less of its flour." And Liebhauser, defendants' witness and a customer of both parties (Q. 15, C. Q. 6-9), bought defendants' flour because it was cheaper, believing it to be the genuine.

SEVENTH. In addition to the use of the *black brand*, admitted by the answer and established by the proofs, it also appears from the testimony, and there is no attempt to contradict the proofs that the DEFENDANTS ALSO USED A LIKE BRAND IN BLUE AND RED, notwithstanding the positive averment in the answer "*That the said brand is in black.*" In this red and blue brand the word "Columbia" was in red color and the remainder in blue, as in complainant's brand. See the testimony of Perrin (Q. 119 to 126); Wood (Q. 230 to 242 and 251 to 261); Runyon (Q. 336 to 342 and 346 to 352; C. Q. 323-4); Sanderson (Q. 622-5).

So, it is shown that the defendants used, to some extent at least, a brand which was in its coloring identical with complainant's, and in its subject-matter substantially the same—such a brand as must of necessity have misled all but experts in such matters. And it should be borne in mind that in the proofs all of defendants' inquiries of experts as to similarity of brands related solely to the *black brand*.

EIGHTH. It is urged in the defense that defendants "have never sold any flour not manufactured by the complainant as being the flour of the complainant; that they have not knowingly or actually used or caused to be used any brand for flour in imitation of any brand used by the complainant;" and they offer the testimony of Samuel Alcorn to show that he never represented the flour he sold to be of complainant's manufacture (Q. 38), and the testimony of several customers to the effect that it had not been represented to them as complainant's flour.

It is sufficient for complainant's case that it is shown that the defendants sold flour so branded as that it actually misled or was likely to mislead purchasers. It is not material what the motive was, or what, if any, representations were made. Ignorance of the complainant's brand would not justify the use, nor would positive proof of the absence of wrongful intention free defendant from responsibility for their acts. It is sufficient, if the right in complainant is shown and its violation by defendant is established, and it is not necessary to show a guilty knowledge or fraudulent intent on the part of the wrong-doer.

See:

Coleman v. Crump, 70 N. Y., 578.

Dreydroppel v. Young, 14 Phil., 226; Am.

Coleman v. Crump, 70 N. Y., 578.

Dreydroppel v. Young, 14 Phil., 226; Am. T-M. Cases, 423.

Hier v. Abrahams, 82 N. Y., 519; Am. T-M. Cases, 438.

Williams v. Brooks, 50 Conn., 278; Am. T-M. Cases, 654.

Sykes v. Sykes, 3 B. & Cr., 541.

Dale v. Smithson, 12 Abb. Pr. 237, R. Cox, 282.

Coffeen v. Brunton, 4 McLean, 516; 5 McLean, 256.

Millington v. Fox, 3 My. & Cr., 338.

Collins & Co. v. Walker, 7 W. R., 222.

Clement v. Maddick, 1 Giff. 98; 5 Jur. N. S., 592.

Cartier v. Carlisle, 31 Beav., 292.

Glenny v. Smith, 2 Drew & Sm., 476.

NINTH. The defendants make no showing to rebut the natural presumption that their adoption and use of the counterfeit brand was for the purpose of trafficking on the reputation of complainant's flour. The doing of the wrongful act is established—the motive for doing it is unexplained. The answer denies any wrongful intention, and justifies the act by asserting a use of the brand by the defendants prior to its adoption by complainant. But when they come to their proofs the defendants are silent upon this vital point, and seem content to rest that issue upon a feeble showing that someone else had previously used the brand, and that when defendants themselves have used it "they never said the flour was complainant's."

The senior member of the defendants' partnership did not testify at all, and the other member, Samuel Alcorn, though he states that he has been a member of the firm since March, 1884, makes no statement of the use of the brand by them prior to the year 1887. Sanderson (Complainant's Evidence, Q. 608-615) says they commenced using the brand for defendants in 1887, and the defendants attempt no explanation of circumstances or reasons that led them to its adoption and use. Alcorn's version of the conversation had with Wade, when notified by him to stop infringing (Q. 102-105), leads to the inference that at that time the defendants claimed no right in themselves to the brand. The fact that since suit was brought they stopped the infringement indicates that they could not establish their pretended right. It is explained by Alcorn (Q. 63-66) that the reason for abandoning the use was that there was "no value, not five cents worth in the brand" to them, and that they believed it would end an expensive litigation. This explanation, no doubt, seemed a satisfactory one to him, and has the merit of plausibility. But on examination of Sanderson's testimony (Q. 618-619), it appears that the true reason for their stopping the use was that the mill that furnished them the flour had declined to apply the brand for them, after being notified by complainant to cease the infringement.

While the complainant has not directly proved a wrongful intent on the part of the defendants, facts have been disclosed that are inconsistent with any theory of innocent purpose in their doings. The use of the simulated brand being shown, its capability to mislead being shown, and there being a want of satisfactory explanation for its use, the defendants are presumed to have intended the natural and probable consequence of their acts, and to have intended the deception they practiced.

Amoskeag Manufacturing Co. v. Spear, 2 Sand. S. C., 599; R. Cox, 187.

Liggett & Myer Tobacco Co. v. Haynes, 20 F. R., 883; Am. T-M. Cases, 898-901.

Avery v. Meikle, 81 Ky., 73; Am. T-M. Cases, 753.

Taylor v. Taylor, 2 Eq. Rep., 290; Cox Manual, T-M. Cases, 124.

Godilot v. Hazard, 44 N. Y. S. C., 427; Am. T-M. Cases. 125-131.

Dixon Crucible Co. v. Guggenheim, 2 Brews., 321.

Taylor v. Carpenter, 11 Paige, 292; R. Cox, 45.

Seixo v. Provezende, L. R. 1 Ch., 192; Cox, Manual T-M. C., 146.

TENTH. The defendants have tried to draw a distinction between the two brands by having it appear that there was "Columbia Patent" while the complainant's was merely "Columbia," and the supposed distinction was preserved throughout by them in interrogating the witnesses. It must be remembered that the word "Patent" is also used by the complainant after the word "Columbia," and that it is quite satisfactorally shown that the term "*Patent*" used in connection with flour is merely *indicative of grade.*

The introduction of purifiers and other modern mill machinery by means of which the "middlings" produced in milling were utilized in producing flour, caused the best grade of the flour of a mill's manufacture to be commonly termed "patent," and that designation is now generally so used and understood, and means nothing more than that the flour so designated is of the best grade of the mill's manufacture. See complainant's testimony, Perrin, (Q. 118); Carrol, (Q. 278); Wade, (Q. 576–580); Sanderson, (Q. 645–649); Ziedler, (Q. 663); Hoover, (Q. 864). Respondents' testimony, Supplee, (Q. 11, 13, 37, 41); Norris, (Q. 35); Brook, (Q. 6, 8); Webster, (Q. 28); Hilton, (Q. 5-9); Keen, (Q. 5).

ELEVENTH. The gist of the contention is that complainant claims to be lawfully exercising the right to the use of a certain distinctive brand which it asserts the defendants are wrongfully imitating to the injury of the complainant. If the complainant is rightfully using the brand and the defendants have failed to show a right in themselves to use it, and their use of it is shown to be unfair and injurious to the complainant, then the complainant is entitled to its remedy against them. The *prima facie* right of the complainant being established, the burden is upon the defendant to prove an earlier, or at least a rightful, use by them of the brand. The defense of earlier use was set up but there was no serious attempt to prove it.

The only testimony relating to such defense is that of Samuel Alcorn when called by the complainant for another purpose. Being asked how long he had been in the flour business (Q. 485), and having answered "about four or five years," and (Q. 486) that he is a member of the firm of William W. Alcorn & Co., and (Q. 487) having admitted the use of the brand alleged, he was asked (Q. 490), "How long have you used that brand?" and answered, "Well, the firm of Alcorn, Baker & Company used that brand as far back as 1874, I think, or 1875; somewhere along there." (Q. 491) "How do you know?" Ans. "By seeing it entered up on the books as having been sold under that brand."

Bearing in mind that he had been but four or five years in the firm; that he does not say that he ever saw any of the flour so branded, or state any fact to authenticate the book entries, or any fact from which it might be inferred that he had any actual knowledge in the matter; that the statement is merely that he saw on the books such an entry made as far back as 1874 or 1875, and does not state any fact to show that it was at that time a brand of Alcorn, Baker & Co., or that, if it was, there was any continuance of its use; that when testifying on behalf of defendants he made no statement of such use, nor any statement tending to corroborate the pretended claim; and the fact that the other defendant, who, if anyone, could make good the claim, was not produced as a witness; such testimony is not entitled to much weight. To make good this defence of prior use it is incumbent upon the defendants to show by competent proofs, not only that they sold flour in 1874 or 1875 that was so branded, but further, that the brand was at that time their own by adoption, and such continuance of its use between that time and 1887, when the use complained of began, as would indicate an intention to acquire title by adoption and use, and rebut the natural presumption that such earlier use was accidental and had long since been discontinued. For "priority will not be defeated because the same emblem has accidentally been used by others in the same business. This is reasonable, for a trade-mark cannot be adopted except intentionally."

(Browne T-M. S. 383.)

And as stated by Upton T-M., page 47:

> "If the name or marks adopted, were not, at or near the time of their adoption, in actual use to designate the same or similar articles of manufacture, the adoption, it is presumed, would be held to be sufficiently original to comply with the legal requisition, even though the same name or marks had been used in like manner at some previous period. The sole purpose being that the marks adopted shall be such as will identify the thing named, as that of the person naming it, and distinguish it from all others: this purpose is accomplished if the name be not then in like use, or had not been within a period so recent as would be likely to defeat the primary purpose of distinctive designation."

If the brand in controversy were conceded to have been the property of defendantsin 1875, their right was long ago lost by abandonment, and they could not re-acquire it after complainant had rightfully appropriated it. Browne S., 677.

Brower v. Boulton, 53 Fed. Rep., 389.

Gray v. Taper-Seeve Pully Works, 16 Fed Rep., 436-440.

Blackwell v. Dibrell, 3 Hughes, 151.

A mere icnidental use, such as that testified to, if it be conceded that there was such use, would not be sufficient to affect complainant's right.

Coxe, J., in *Holt v. Menendez*, Am. T-M. Cases, 986; (affirmed in *Menendez v. Holt*, 128 U. S., 514) says:

> "But even should the finding be made that a few years before, was adopted by Holt & Company the name "La Favorita" was used at St. Louis as a brand for flour, it must also be said that the use was casual and fortuitous, and continued for a short period only. As a distinguishing brand for flour at St. Louis it was soon abandoned and forgotten."

In *Atlantic Milling Co.v. Robinson*, 20 Fed. Rep., 217, the defendant controverted the complainant's right to exclusive use of the word "Champion" as a trade-mark for flour, by the testimony of two witnesses, to the effect that they used it or saw it used as a brand upon flour before it was adopted by complainant, one of the witnesses failed to show a use prior to the adoption by complainant, and as to the other, the court (Wallace, J.) says:

> "The witness Reamey testifies that he used it for branding the flour of nine different mills as long ago as 1857 (complainant's use began in 1861). None of the persons for whom it was so used have been produced, although many of them were accessible. If Reamey's statement is correct it could have been readily corroborated. The failure to do so is significant. His statement is not supported by any extrinsic evidence, and it is not deemed sufficiently reliable to defeat the complainant's right."

And having failed to make good the defense of their own prior use of the brand, the defendants have endeavored to raise a doubt as to complainant's title by an attempt to show prior use by others, but they do not show themselves entitled to make such a defense. The controversy here is between this complainant and these defendants, and it is no help to them to show what others may have rightfully or wrongfully done. The justification of their acts must rest on some privilege expressly or impliedly extended to them. Proof only of use by others does not serve to relieve them. As stated by Daniels, J., in *Newman v. Alvord* (49 Barb., 588; R. Cox, 404-419), "Such a use of it must be shown as will extend to and include the defendants. Until that is done, the use made of it by the plaintiffs may well be exclusive of the defendants, without being so as to the inhabitants of the village of Akron."

And as said by Marvin, J., in the same case:

> "I am not prepared to concur that no more than one person or firm can acquire a right to a trade-mark as against all others. The right sought to be protected must undoubtedly be exclusive of the party complained of. I know that in speaking of the plaintiff's right the judges speak of it as exclusive of the defendant, or there will be no cause for complaint. But, keeping in mind the principles upon which the action is founded, I am not able to see why two or more persons may not have the same right to the exclusion of all other persons."

The courts have uniformly treated with disfavor the character of defense that seeks to justify wrongful appropriation of trade-mark and analogous rights by attacking the exclusiveness of the complainant's ownership. The following are illustrations:

Blackwell v. Dibrell, 3 Hughs, 151; 14 O. G., 633; Am. T-M. C., 39.

Plaintiffs were manufacturers of smoking tobacco at Durham, in North Carolina, and labeled their tobacco with the figure of a Durham bull and the words "Durham Smoking Tobacco." The defendants manufactured tobacco at Richmond, Va., and labeled it in the same way, except that the head and neck of the bull were substituted for the entire figure.

Per Hughes, J., (page 51, Am. T-M. C.):

> "The use of the principal characteristics of their trade-mark by manufacturers not conducting their business at Durham is a deception put upon the public, and may be enjoined upon that ground alone, irrespective of the trade-mark right.
>
> I have some doubts whether in a litigation between Blackwell & Co., on the one hand, and the defendants not doing business in the town of Durham on the other, it was competent for the court to decree that Blackwell & Co. have the exclusive right to the use of the word and symbol characterizing their trade-mark; but it is certainly competent for us to render a decree responsive to the issue made by the allegations and denials of the bill and answer, one of which is the right of exclusive use claimed by Blackwell & Co. As between the complainants and defendants in this suit, therefore, we may so decree, even though other persons than the defendant to this record be not bound by the decree."

Annheuser-Busch Brewing Association v. Pisa, 24 F. R., 149. Am. T-M. C., 952.

Complainant, a brewer in St. Louis, Mo., made and exported to Panama and South American ports, beer in bottles with a label bearing the words "St. Louis Lager Beer." Defendant, a shipper of beer from New York City, and a competitor of complainant in trade in Panama and South America, labelled his bottles "St. Louis Lager Beer."

Held: (by Wallace, J.), that:

> "Although the complainant cannot have an exclusive property in the words 'St. Louis' as a trademark, or an exclusive right to designate its beer by the name of 'St. Louis Lager Beer,' yet, as the beer has always been made at that city, its use of the designation upon its labels was entirely legitimate, and if the defendant is diverting complainant's trade by any practice designed to mislead its customers, whether these acts consist in simulating his labels, or representing in any other way, his products as those of complainant, the latter is entitled to protection."
>
> "It is no answer for the defendant when the complainant asks for protection, to say that it has no exclusive right to designate its products in the manner it has, although this might very pro-

perly be asserted by a competitor selling beer made at St. Louis, or who, by reason of any circumstances, might be entitled to represent his products as originating there." (Citing *Canal Co. vs. Clark*, 13 Wall., 322.)

(P. 955). "It is unnecessary for present purposes to consider whether the complainant has a valid trade-mark, or can have a technical trade-mark in the name 'St. Louis.' It is sufficient that it was lawful for the complainant to use that name to designate its property; that by doing so it has acquired a trade which is valuable to it, and that the defendant's acts are fraudulent and create a dishonest competition detrimental to the complainant."

Southern White Lead Co. v. Carey, 25 Fed. Rep., 125; Am. T-M. C., page 996.

Complainant, manufacturing at St. Louis, Mo., marked its kegs "Southern Company," forming the upper half of a circle, and "St. Louis" the lower half; and within the circle the words "Warranted strictly pure white lead in pure linseed oil." A red crescent was also stenciled in the upper half of the head of the keg. The defendants manufactured in Chicago and branded their kegs "Southwestern St. Louis," surmounting the words, "Strictly Pure White Lead." The arrangement and size of the words was similar to complainant's, but omitted the crescent.

Gresham, J., says:

"The complainant claims a trade-mark in its two brands, one without the red crescent and the other with it, and this bill is filed to enjoin the defendants from infringing the first of these trademarks."

"I shall not stop to inquire whether the complainant's claim to the trade-mark is or is not well-founded, as I think it is entitled to an injunction on another ground. The defendants so brand the heads of their kegs as to naturally mislead and induce persons purchasing for consumption to suppose they are purchasing the complainant's lead, when they are getting an inferior article. The brand used by the defendant is so like the complainant's as to induce the public to mistake one for the other. The defendants sell their goods to retail dealers, and it may be that such dealers are not deceived, but they sell to consumers who are or may be deceived."

Avery & Sons v. Meikle, 27 O. G., 1,027. 81 Ky., 73; Am. T-M. C., 753.

Where the action is to restrain fraudulent usurpation of plaintiff's trade reputation, plaintiff need not make out a legal title to exclusive trade mark. It is enough that defendant sells his goods as those of plaintiff, whether by use of plaintiff's trade-mark or any other means, that such fraudulent sales result, or are likely to result in damage to plaintiff.

Wotherspoon v. Currie, L. R S. H. L., 508; 42 L. J. Ch., 130; L. T. N. S., 393.

The plaintiffs being manufacturers of "Glenfield Starch," carrying on business in succession to the original makers, at Glenfield, afterwards at another place, the defendant obtained possession of a small plot of ground at Glenfield and began to manufacture starch and sell it in packets, on which the word "Glenfield" appeared in large and conspicuous letters.

Injunction granted to restrain the defendant from using the word "Glenfield" in connection with his starch, notwithstanding that his own name had also been placed on his packets.

Per Lord Westbury (L. R., 5 H. L., 522):

> "I have no doubt that this case comes within the principle on which the jurisdiction is founded. The principle being to prevent a party from fraudulently availing himself of the trade-mark of another which has already obtained currency and value in the market, by whatever means he may devise for the purpose, provided the means are devised in order to give him a colorable title to the use of the word, and provided it may be shown from the manner in which he has employed those means that his object was from the begining to invade the property of the appellants."

And see:

Hine v. Lart, 10 Jur., 106; 7 L. T., 41.

Dent v. Turpin, 2. J. & H., 139; 30 L. J. Ch., 495; Cox Manual, 196.

Southorn v. Reynolds, 12 L. T. N. S., 75.

Thorley's Cattle Food Co. v. Massam, 42 L. T. Rep. N. S., 851.

Funke v. Dreyfus, 34 La. Ann. R., 80; Am. T-M. Cases; 594-603.

Filley v. Fassett, 40 Mo., 173; R. Cox, 530.

TWELFTH. And the defendants not only appropriated the characteristic word of the complainant's brand and use it in similar arrangement with other words and figures, and, in some instances, with the same coloring, but, in addition, untruthfully used the words "Minneapolis, Minn.," and "Minnesota" as indicative of the place of origin. Their flour was not made either in the City of Minneapolis or the State Minnesota. The complainant shows by the witnesses, Ziedler, Holmes, (F. E.), Greenleaf, Pillsbury, Whitmore, Sammis, Christian, Schober, Palmer, Barber, Crocker, Martin, Pettit, Holmes, (H. W.), and Loring, representing all of the flouring mills in Minneapolis, that the defendants' flour did not emanate from Minneapolis; and complainant called Samuel Alcorn to prove that it was not made in Minneapolis, but was made by E. Sanderson & Co., at Milwaukee, Wis. The witness admitted that it was not made in Minneapolis, but declined, under instructions from his counsel, to state where or by whom it was made. (Complainant's Evidence, Q. 488-9). Afterwards, however, when complainant had commenced proceedings against Sanderson & Co., Alcorn, testifying in behalf of defendants, says the flour branded as charged was made at Milwaukee by E. Sanderson & Co. (Q. 24), and in this he is corroborated by Sanderson. (Complainant's Evidence, Q. 608-618, 625).

The defendants seek to justify such untruthful use of the name of the place of manufacture by attempting to show by proofs that it is not misleading. And they show that several mills outside of the State of Minnesota use the word "Minnesota" on their flour; and Samuel Alcorn says (Q. 86-7) that a mill at Huston, Minn., and one at Austin, Minn., use the word "Minneapolis" on a flour brand. And they further show by the testimony of several flour dealers and bakers that they understand the words "Minneapolis, Minn." or "Minnesota" on a flour brand to denote that the flour is spring wheat flour. The cross-examination of these witnesses, however, makes it clear that such an understanding arises from the fact that all Minnesota flour is spring-wheat flour and that when flour is branded so as to indicate that it came from that state the natural inference is that it is made from spring wheat. The testimony on this matter is entirely that of flour dealers and bakers, and has reference to their understanding; and there is no pretence of a showing as to what effect such branding would have on the minds of small dealers and consumers,—the unwary and inexperienced in such matters. If the defendants used such designation for a wrongful purpose, or if, in itself, it was calculated to misinform purchasers as to the place of origin, the respondents' wrong is not lessened by the fact that others also have been guilty of the same offense. Nor does it justify the act that the unwarranted use has been so extensively practiced as that in some communities there may be found individuals who may look upon it as a custom, and who would not be deceived. The growth of the evil is due to the fact that the wrong doers seldom use these terms of origin in connection with the private marks of other parties, and so no ground for relief is afforded. But when, as in the present case, the place of origin is untruthfully associated with a brand that is wrongfully appropriated, it becomes a twofold wrong, for which the law should provide a remedy to the injured party.

It is not contended that the complainant's right to the use of the words "Minneapolis, Minn.," or "Minnesota" is exclusive of others who may truthfully use them, but it is contended that the defendants' use of those geographical terms, in connection with the word "Columbia," is unwarranted and hurtful to complainant.

The object of the intervention of the courts in such cases is to prevent one person from selling his goods as those of another, to the injury of the latter and of the public.

The Court said in

Coats et al. v. Merrick Thread Co., 13 Supreme Court Rep., P. 966.

"There can be no question of the soundness of the plaintiffs' proposition that, irrespective of the technical question of trade-mark, the defendants have no right to dress their goods up in such manner as to deceive an intending purchaser, and induce him to believe he is buying those of the plaintiffs. Rival-manufacturers may lawfully compete for the patronage of the public in the quality and price of their goods, in the beauty and tastefulness of their enclosing packages, in the extent of their advertising, and in the employment of agents, but they have no right, by imitative devices, to beguile the public into buying their wares under the impression they are buying those of their rivals.. Perry v. Truefitt, 6 Beav., 66; Croft v. Day, 7 Beav., 84; Lee v Haley, L. R. 5 Ch. App., 155; Wotherspoon v. Currie, L. R. 5 H. L. 508; Johnson v. Ewing, L. R. 7 App. Cas., 219; Thompson v. Montgomery, 41 Ch. Div., 35; Taylor v. Carpenter, 2 Sandf. Ch., 6031; Manufacturing Co. v. Spear, 2 Sandf., 599; McLean v. Fleming, 96 U. S., 245; Boardman v. Meriden Britannia Co., 35 Conn., 402; Gilman v. Hunnewell, 122 Mass., 139."

It might be appropriately said here as was said by the circuit court of Appeals in *Le Page Co. v. Russia Cement Co.*, 2 C. C. A., 555-9.

" It would be mere self-stultification for this court to assume not to see, what every practical person of intelligence must see, that the innumerable persons dealing with this class of merchandise (glue), or with such merchandise as the Day and Martin Blacking covered by *Croft v. Day, ubi supra*, the words " LePage's Glue," and "Glue Manufactured by LePage," or the words "Day and Martin's Blacking," and "Blacking Manufactured by Day and Martin," mean, or soon come to mean one and the same thing, and that both will inevitably be soon styled alike in the market."

In *Avery v. Meikle, supra*, the court says (Am. T-M. C., 772):

"The law says you may use anything which is the common property of all, or that cannot be exclusively appropriated, but you must use it to convey the idea which it commonly expresses, and of which it is the accepted sign. You must use it to tell the truth, the whole truth and nothing but the truth. You cannot, under the pretense of exercising the common right of use, and by reason of the fact that the means represent the quality and size of your goods, so use them while they perform this simple and innocent purpose, apparently representing quality and size, caution and description, you cause them to do more, to represent your goods as those of another, and, by the seeming fairness which follows the selection of a legal or innocent instrument or means, escape the consequences of an illegal use thereof."

Justice Field, in *Manhatten Medicine Co. v. Wood*, 108 U. S., 218, uses the following language:

"To put forth a statement, therefore, in the form of a circular or label attached to an article that is manufactured in a particular place, by a person whose manufacture there had acquired a great reputation, when, in fact, it is manufactured by a different person at a different place, is a fraud upon the public which no court of equity will countenance."

See also:

McAndrew v. Bassett, 33 L. J. Ch., 561. (*Anatolia Licorice Case*).

Newman v. Alvord, 49 Barb; R. Cox, 404. (*Akron Cement Case*).

Blackwell v. Armistead, 5 Am. L. T., 85, and *Blackwell v. Dibrell*, Am. T. M. Cases, 39. (*Durham Smoking Tobacco Case*).

Lea v. Wolf, 13 Abb. Pr. N. S., 389; 46 How. Pr., 157. (*Worcestershire Sauce Case*).

Dunbar v. Glenn, 42 Wis., 118 (*Bethesda Mineral Water*).

Kinney v. Basch, 16 Am. L. R. N. S., 596. (*St. James Cigarettes*).

Braham v. Beachim, 7 Ch. D., 848. (*Rodstock Coal Co. Case*).

II.

But complainant contends, further, that it is not only entitled to the equitable interposition of the court to prevent unfair interference with its business, but also that upon the showing made by the record it should be held entitled to the exclusive use of the word "Columbia" as an arbitrary designation for spring-wheat flour; that is, that by adoption and use, it acquired the exclusive use of the word "Columbia," as a trade-mark, in the technical sense, to designate flour of its manufacture.

The proofs relative to prior use by others of the word "Columbia" as a distinguishing title for flour are not sufficient to disentitle complainant to claim an exclusive right to that word alone as a trade-mark for spring-wheat flour.

The respondents' testimony on the question of prior use is confined to witnesses Alcorn, Keen, Supplee and Allen.

Samuel Alcorn's testimony (Q. 91 to 96) is to the effect that there is a "Columbia Mill Company," of Brown county, Dakota, which started in 1882, a "Columbia Elevator and Grain Mill," of Providence, R. I., which started in 1877, and a "Columbia Mill Company," of Oakland, Indiana; and that these concerns used the brand long before the complainant was in existence. On cross-examination, however (Q. 109-119), he admits that he has no personal knowledge of these matters, and that his testimony is based entirely on hearsay. (This testimony was objected to on the ground of incompetency, as appears on record.)

Keen, a Philadelphia flour dealer (Q. 1-5, p 84), says he knows of a mill by the name of "Columbia," at Columbia, Dak., and that he has been in the town of Columbia. He does not state when he was there, nor does he attempt to describe the brand, or state where or how long it was in use, or that he ever saw it. His testimony proves nothing further than that he saw a mill of that name at that place.

Supplee (p. 85, Q. 2), also a Philadelphia flour dealer, says: "Columbia City, Dakota, has a mill that has a brand 'Columbia,' and I think I have seen one or two other 'Columbias' around, but I cannot state where the mills are just now." He gives no description of any such brand, states no time or place of seeing it, nor any fact upon which his assertion that he has seen such brand could be made material or competent.

Allen, a stencil cutter (p. 71, Q. 8-13), says that in 1865 or 1866 he made a stencil with the name "Columbia" on it for Mr. Hollingsworth, who was one of the owners of a mill in Brooklyn, N. Y. His cross-examination shows that he knows nothing of the use of the stencil; that he delivered it to Hollingsworth, but was not informed that it was ever used. And there is no other testimony relating to that stencil or that mill.

The complainant's rebutting testimony indicates the true character of the pretended prior use. George A. Klenck (p. 116), testifies that he is one of the firm known as the Columbia Mill Company, owning a flouring mill at Oakland City, Ind.; that the mill is of small capacity, and grinds *winter wheat* exclusively; that it uses for a small portion of its flour in sacks for a single customer in Evansville, Indiana, a brand containing the words "Pride of Columbia"; has never used a similar brand for any other firm, and has used it on sacks only, and has never used it upon barrels. This brand, which is attached as an exhibit, has many distinguishing features that render it quite different from complainant's. And further, the use of the words "Pride of Columbia" by the Indiana mill was upon winter wheat flour only, and the complainant uses its brands on spring wheat flour exclusively. The testimony on both sides shows that there is a well recognized distinction between these two kinds of flour, and that they are regarded as different classes and are not sold one in competition with the other. See testimony of complainant's witnesses: Perrin, (Q. 153-154a); Wade, (Q. 576-581); Klenck, (Q. 602); Zeidler, (Q. 658-662); respondents' witnesses, Pyle, (Q. 32-34); Webster, (Q. 31); Hilton, (C. Q. 47-48); Norris, (Q. 42-44); Supplee, (35-41); and Alcorn, (Q. 100).

The flour sold by respondents containing the simulated brand was spring-wheat flour, so says Sanderson, who made it, (Q. 626); and Alcorn, who sold it, (Q. 19).

A trade-mark is confined to the particular class of goods upon which it is used. *Browne*, S. 66-67.

As illustrative of the sub-division of general classes, it was held that:

"Iron Clad" may be used by one for rubber boots and by another for leather boots. *Hecht v. Porter*, 9 Pacific Coast, L. J., 569.

"Magnolia' for whiskey by one and for gin by another. *Browne*, S. 68.

"I. X. L." as a mark for *chopping axes* by one, for *cutlery* by another, and for *scythes* by a third. *Browne*, S. 69.

See also, *Smith v. Reynolds*, 10 Blatch, 100; and 13 *id.* 458.

Societe &c. v. Baxter, 14 O. G., 679.

As to the mill at Columbia, Dakota, it is shown that the name of the company was the "Columbia Milling Company"; that the company was organized in 1885; that previous to that time the mill was owned by a copartnership known as "F. H. Townsend & Co.", by whom it was built in 1882; that for a portion of its flour it used a brand containing the words "Pride of Columbia"; that afterwards, in 1887, the brand was changed to read "Columbia Patent," and this was used on sacks only; that in February, 1888, the mill was sold under foreclosure of mortgage and is not being operated. (See testimony of Lavin and others, Record 92 to 97).

While it appears from this testimony that the mill at Columbia, Dakota, was built in 1882, it does not appear when it commenced making flour, nor when the brand containing the words "Pride of Columbia" was first applied; the name "Columbia Milling Co." was first used in 1885; and the property having been sold under foreclosure of mortgage in 1888, and the milling of flour stopped, the use of the brand was abandoned. The brands of this mill are introduced as exhibits, and are seen to be widely different from complainant's in appearance. And if the fact were that the "Pride of Columbia" brand of the Dakota mill had been used earlier than complainant's use of the single word "Columbia," it would not follow that the latter would not constitute a valid trade-mark. The word "Pride" is as much of the essence of the two former brands as "Columbia" (*Hier v. Abrahams,* 82 N. Y., 519; Am. T-M. C., 438), and it can hardly be seriously claimed that such a combination of the two words would inhibit the use of either alone, in a brand otherwise different. And in any event, the question of right could arise only between the owners of the "Pride of Columbia" brand and complainant. But there is not only no evidence of complaint on their part, but complainant's right seems to have been conceded.

SUMMARY.

It appears in the case that the complainant has continuously and extensively used the brand or trade-mark "Columbia" for spring-wheat flour of its manufacture since about the first of January, 1883; and by the year 1887 it had an established trade of considerable extent in Philadelphia and vicinity; that defendants were flour dealers selling in the same region to the same general class of customers and in many instances to the same customers as complainant; that in 1887 defendants' commenced using a brand in which the same word (Columbia) was the leading feature, and while in most cases their brand was entirely black, in some instances the word Columbia was of red color and the remainder blue, as in complainant's brand; that in such use by defendants the words "Minneapolis, Minn." and "Minnesota" were used in a manner to indicate the place of origin, when, as it appears, the flour was made in Milwaukee, Wis.; that the defendants, use of the brand was calculated to mislead and as a matter of fact did in some instances mislead purchasers and consumers of their flour into the belief that it was flour of complainant's manufacture; and that thereby loss of sales and damage resulted to the complainant.

Defendants admit that they so used the brand on over 8,000 barrels of flour, but failed to give any satisfactory explanation of their adoption of the brand, or to make any showing calculated to relieve them from the necessary presumption of an intent to traffic upon and profit by the favorable reputation of complainant's flour so branded.

The complainant's right is a right of property, based upon possession, acquired by the adoption and use of a distinctive mark for a vendible commodity, and it is entitled to protection in its property right against an unfair use by defendants of an imitative mark upon articles of the same kind—whether or not the mark constitutes a technical trade-mark. Equity gives relief in such cases upon the ground that one man is not allowed to offer his goods for sale in such manner as to represent them as of the manufacture of another trader in the same commodity. In such cases the court proceeds upon the ground that the complainant has a valuable interest in the good will of his trade or business, and having rightfully adopted a particular label, sign, brand or trade-mark indicating to his customers that the article bearing it is made or sold by him or by his authority, or that he carries on business at a particular place, he is entitled to protection against one who attempts to deprive him of his trade or customers by using simulated labels, signs, brands or trade-marks without his knowledge or consent. See *McLean v. Fleming*, 96 U. S., 245.

As was said in *Canal Co. v. Clark*, 13 Wall. 311:

> "The first appropriator of a name or a device pointing to his ownership, or which, by being associated with articles of trade, has acquired an understood reference to the originator or manufacturer of the articles, is injured whenever another adopts the same name or device for similar articles, because such adoption is, in effect, representing falsely that the productions of the latter are those of the former. Thus the custom and advantages to which the enterprise and skill of the first appropriator had given him a just right are abstracted for another's use, and this is done by deceiving the public,—by inducing the public to purchase the goods and manufactures of one person, supposing them to be those of another."

It is the policy of the law to protect the owner of a trade-mark "wherever the design of a person who imitates it, be his design apparent or proved, is to impose his goods upon the public as those of the owner of the mark, and the imitation is such that the success of the design is a probable or possible consequence." *Amoskeag Manufacturing Co. v. Spear*, 2 Sand S. C., 599; R. Cox, 87.

Walton v. Crowley, 3 Bl. C. C., 440; R. Cox, 166.
Barrows v. Knight, 6 R. I., 434; R. Cox, 238.

To constitute an infringement it is not necessary that there should be exact similitude of the genuine and imitative brands. There may be differences, but in such case, as stated by Wood, V. C., (*Taylor v. Taylor*, 2 Eq. R., 290; 23 L. J. Ch., 255).

> "The court must ascertain whether the differences are made *bona fide* in order to distinguish the one article from the other, whether the resemblances and the differences are such as naturally arise from the necessity of the case, or whether, on the other hand, the differences are simply colorable, and the resemblances are such as are obviously intended to deceive the purchaser of the one article into the belief of its being the manufacture of another person. Resemblance is a circumstance which is of primary importance for the court to consider, because if the court finds, as it almost invariably does find in such cases as this, that there is no reason for the resemblance, except for the purpose of misleading, it will infer that the resemblance is adopted for the purpose of misleading."

The facts established are believed to be sufficient to entitle the complainant to the equitable protection uniformly accorded where it is shown that one person is using labels, signs, marks or other *indicia* by means of which his goods may be made to pass for those of another.

It is therefore respectfully urged that complainant is entitled to a decree in conformity with the prayer of its bill.

C H Gunckel

Counsel for Appellant.

150 US 460

150-460

RECORD, CASE No. 14,051.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO., ~~357~~. 115

THE COLUMBIA MILL COMPANY, APPELLANT,

vs.

WILLIAM W. ALCORN AND ~~JAMES~~ Samuel ALCORN, TRADING
AS W. W. ALCORN & COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF PENNSYLVANIA.

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1 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

THE COLUMBIA MILL COMPANY, a Corporation Duly Organized and Existing under the Laws of the State of Minnesota,
vs.
WILLIAM W. ALCORN and SAMUEL ALCORN, Copartners as W. W. Alcorn & Co. and Residents of the City of Philadelphia and Citizens of the State of Pennsylvania and of the United States.
} No. 14. April Session, 1888.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, } *ss:*

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of
2 Pennsylvania, in the third circuit, of April session, 1888. No. 14.

It is thus contained:

Be it remembered that on the third day of May, in the year of our Lord one thousand eight hundred and ninety, the Columbia Mill Co., by its solicitor, P. H. Gunckel, Esquire, comes into court here and files its bill of complaint against William W. Alcorn and Samuel Alcorn, trading as W. W. Alcorn and Company, in the words and figures following, to wit:

3 United States Circuit Court for the Eastern District of Pennsylvania. In Equity.

To the judges of the circuit court of the United States for the eastern district of Pennsylvania:

The Columbia Mill Company, a corporation duly organized and existing under the laws of the State of Minnesota, brings this its bill into this court against William W. Alcorn and Samuel Alcorn, copartners as W. W. Alcorn & Co. and residents of the city of Philadelphia and citizens of the State of Pennsylvania and of the United States.

1. And thereupon your orator, complaining, shows unto your honors that it is a corporation duly incorporated by the name aforesaid, and organized and existing under the laws of the State of Minnesota, and having its principal place of business at the city of Minneapolis, in said State; that the business of said corporation is principally manufacturing and selling wheat flour, its milling being done wholly at its mill, known as the "Columbia mill," in said city of Minneapolis, and its sales of flour being made partly in said city, but largely through agencies at Chicago, Philadelphia, New York, Boston and other cities of this country, and in foreign countries;

that it manufactures flour in large quantities from grain commonly
4 known as hard spring wheat, by the system known as
the roller process, and applies distinctive arbitrarily selected names or brands or trade-marks to the packages containing its flour, and offers for sale and sells its flour to the trade and public under and by such names or brands or trade-marks; that its flour is put up for the market in the usual sacks and barrels to which the said arbitary names are applied, by printing on the sacks and stenciling on the heads of the barrels; and that it so applies, and has for five years or more last past, continuously applied to its flour the word "Columbia" as a fanciful or arbitrary name or trade-mark to designate flour of the complainant's manufacture, and applies the same as a brand by printing on the sacks and stenciling on the heads of the barrels, the word "Columbia" usually appearing in a horizontal line in red color, surrounded by a circle formed of the words "Columbia Mill Co., Minneapolis, Minn.," in blue color, and the words "roller process" and "patent" appearing within the lower semicircle.

2. And your orator further says that it and its agents have, during the period aforesaid, designated and identified and made known to flour dealers and consumers of flour of your orator's manufacture, its flour, by the name or trade-mark "Columbia," and that by reason of the efforts of your orator and its agents and the excellent quality of the flour so made and branded and sold by them, the same has become widely known as a valuable and useful article and has acquired a high reputation as such and has become generally known in both local and general flour markets throughout the country by said name or brand "Columbia," and has commanded and still commands an extensive sale under said name or brand at said
5 city of Philadelphia, where your orator has an agent for the
sale thereof, and elsewhere, which is and has been a source of great profit to your orator.

3. Your orator further says that, notwithstanding the long and quiet use and enjoyment by your orator of the said name and trade-mark for flour of its manufacture, the said defendants well knowing the premises, but willfully disregarding your orator's rights, thereafter and in the years 1887 and 1888, wrongfully offered for sale and sold and now offer for sale and sell, at said city of Philadelphia, within the State and district aforesaid, and elsewhere, an article in imitation of your orator's flour, which, with intent to deceive and defraud the public and the buyers and consumers thereof, the defendants have put up, or caused to be put up, or otherwise acquired, in packages similar to those used by your orator, and offered for sale and sold, or caused or permitted to be offered for sale and sold, under the name or brand or trade-mark "Columbia," and that purchasers and consumers thereof were and are deceived and misled into buying the same in the belief that it was and is flour of your orator's manufacture.

4. That your orator is informed and believes that the defendants have used and are using several slightly different brands in imitation of your orator's said brand and trade-mark in offering for sale

and selling flour not of your orator's manufacture, in all of which brands the said word "Columbia" is a constituent part, and the other words and figures, in connection with which the same is used, are such as that the simulated brands are calculated to deceive purchasers and consumers of complainant's said flour, and actually have and still do mislead many of them to buy the flour so offered and sold by defendants, in the belief that it is the flour made by complainant, and that one of the brands so as aforesaid used by
6 the defendants in selling flour, contains only the words "high grade" in the upper arc of the circle, and "No. 1 hard wheat," "Columbia," "patent," "196," on horizontal lines thereunder, and the words "Minneapolis, Minn.," forming the lower arc of the circle partly encompassing said horizontally arranged words; and that the flour they so offered for sale and sold was not your orator's flour, or made at its mill, and that the use of the word "Columbia" as applied by the defendants to the flour so branded as aforesaid and sold or offered for sale by them, was and is calculated to deceive the public and the purchasers and consumers of your orator's said flour, and actually has misled, and does mislead, many of them to buy the flour so sold by the defendants in the belief that it is flour milled by your orator, greatly to the diminution of the said business and profits of your orator.

5. And your orator further says, on information and belief, that the flour so as aforesaid branded and sold, or offered for sale by defendants in imitation of your orator's flour, was and is of a greatly inferior quality, and that by reason thereof the general esteem and reputation of your orator's flour known by the said name or trade-mark "Columbia" has been and is being injured, to the diminution of the business and profits of your orator.

6. And your orator further says that it holds and estimates its said trade-mark or name "Columbia" for its flour as of great value to it, but cannot with certainty state the exact amount of your orator's loss and injury suffered by reason of the said wrongful acts of the defendants, but believes the same to be the full sum of five thousand ($5,000) dollars, and so charges the fact.

7. To the end, therefore, that your orator may obtain relief
7 in the premises in this honorable court, where alone adequate relief can be afforded, your orator prays:

That the said William W. Alcorn and Samuel Alcorn may be made defendants to this bill and compelled to answer each and every allegation thereof, without oath (answer under oath being hereby expressly waived), as fully and to the same extent as if they were directly and particularly interrogated as to each allegation.

That the defendants may be compelled to render, before a commissioner of this court, a full, true and perfect account of all profits of every description which they have made, or might have made, by the wrongful use of said name, or brand, or trade-mark, or by the use of any simulated trade-mark, or brand, having as a constituent part thereof the word "Columbia," or by the sale of flour not of your orator's manufacture in anywise represented and sold by defendants, or their agents, as being flour from your orator's mill, and that defendants be decreed to pay over to your orator all such profits.

That the said commissioner be required to ascertain and report to this court, also, what loss or damage has been inflicted upon your orator by reason of its rights and the wrongful acts of the defendants in the premises, and that the said defendants be decreed to pay to your orator such damages.

That the defendants may be decreed to pay the costs of this suit, and that your orator may have such further and other relief as the nature of the circumstances of the case may require, and to this honorable court shall seem meet.

8. May it please your honors to grant unto your orator a pre-
liminary and also a permanent writ of injunction, issuing
8 out of and under the seal of this court, directed to the said de-
fendants and each of them, strictly enjoining them, their
clerks, agents, attorneys and employees, from using the simulated trade-mark aforesaid, or any other trade-mark or brand, or name, for wheat flour in imitation of your orator's said trade-mark; and from selling or offering for sale flour other than of your orator's manufacture under the name or brand "Columbia."

To the end, therefore, that the defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written, they are respectfully required to answer; that is to say:

1. Whether since the first day of January, 1883, they, or any of them, sold or offered for sale any wheat flour not of the complainant's manufacture that was marked or branded with a mark or brand in which the word "Columbia" appeared; and if so, how much of such flour they sold and to whom they sold the same.

2. Whether since the first day of January, 1883, they, or any of them sold, or offered for sale, or caused or knowingly permitted their agents and employes to sell, or offer for sale, flour not of the product of complainant's mill as being "Columbia" flour; and if so, how much such flour was so sold or offered for sale, from whom was the same obtained, and to whom was the same so sold or offered for sale.

May it please your honors to grant unto your orator a writ
9 of *subpœna ad respondendum*, issuing out of and under the seal
of this honorable court, and directed to the said William W.
Alcorn and Samuel Alcorn, and commanding them to appear and make answer to this bill of complaint, and to perform and abide by such order and decree herein as to this court shall seem just.

And your orator will ever pray, etc.

The defendants are required to answer the interrogatories numbered one (1) and two (2).

COLUMBIA MILL CO.,
By ERNST ZEIDLER,
General Manager and Treasurer, Complainant.
P. H. GUNCKEL,
Solicitor for Complainant and of Counsel.

10 STATE OF MINNESOTA,
County of Hennepin, } *ss:*

Ernest Zeidler, being duly sworn, deposes and says that he is the treasurer and general manager of The Columbia Mill Company, the complainant in the foregoing bill, and has read the said bill and knows the contents thereof, and that the said bill is true of his own knowledge except as to those matters which are therein stated to be based on information and belief, and that as to those matters he believes it to be true.

ERNEST ZEIDLER.

Subscribed and sworn to before me this 3rd day of March, A. D. 1888.

M. F. HANLEY,
[SEAL.] *Notary Public, Hennepin County, Minnesota.*

11 Endorsed: No. 14. April sess., 1888. U. S. circuit court, E. D. Pa. Columbia Mill Co. *vs.* W. W. Alcorn & Co. In equity. Bill of complaint. Filed May 3, 1888. P. H. Gunckel, compl't's sol'r.

12 And afterwards, to wit, on the 2nd day of July, A. D. 1888, the respondents, by their solicitors, come into court here and files their answer in the words and figures following, to wit:

Circuit Court of the United States for the Eastern District of Pennsylvania. In Equity.

THE COLUMBIA MILL COMPANY
vs.
WILLIAM W. ALCORN and SAMUEL ALCORN, Copartners Trading as Wm. W. Alcorn & Co. } Answer.

Answer of William W. Alcorn and Samuel Alcorn, Respondents, to the Bill of Complaint of the said The Columbia Mill Company, Complainents.

These respondents saving and reserving to themselves any exceptions to the said complainant's bill of complaint, for answer thereto, say:

First. That they are copartners trading as Wm. W. Alcorn & Co., and that they carry on the flour business in the city of Philadelphia and State of Pennsylvania. That they are receivers of flour, selling on commission flour consigned to them, and are also purchasers on their own account. That, as is the custom of the trade, they put their own brands on the flour or have the mill from which they receive the flour brand it as they desire. That the flour handled by them is put up, as all flour is, in sacks and barrels, and is branded in the usual way by painting on the sack and stenciling on the head of the barrel.

13 Second. That these respondents deny the allegation in the first and second paragraphs of the complainant's bill that the

said complainant had for five years and more last past continuously applied to its flour the word "Columbia" as a fanciful or arbitrary name or trade-mark to distinguish flour of the complainant's manufacture, and aver that the said complainants have during that period used several brands or fanciful names to designate their flour.

Third. That they do not admit that the flour of the complainant branded "Columbia" has acquired a high reputation or commands an extensive sale in the city of Philadelphia.

Fourth. They deny the third, fourth and fifth paragraphs of the complainant's bill.

Fifth. These respondents aver that they do not use any brand or name in imitation of the brand of the said complainants as set forth in the said bill. That they have sold and still sell flour put up in sacks and barrels with various names and designs. That one of the brands so used is in the form of a circle, having the words "high grade," in the upper, and under those "No. 1," then on the next line "hard wheat," then under that in large letters "Columbia," under that in letters of the same size the word "patent," then below it the figures "196," and on the lower arc the word- "Minneapolis, Minn." That the said brand is in black.

Sixth. That these respondents claim ownership of all the brands they use, and assume the responsibility thereof. All their flour branded as hereinbefore mentioned is so branded at the mill at their request and under their direction, and with their brand or stencil. That they have never sold any flour not manufactured by the complainant as being the flour of the complainants. That 14 they have not knowingly or actually used or caused to be used any brand for flour in imitation of any brand used by the complainants, nor have they ever sold any flour branded in imitation of complainant's flour. That they have never come in competition with complainant's flour, nor has any one ever purchased the respondents' flour believing it to be of the complainant's manufacture.

Seventh. That they deny any claim on the part of the complainant to any right to the name "Columbia" as a trade-mark, averring that the same was used by these respondents and other parties long before the said complainant commenced to use it, and that other mills beside the complainant's manufacture and sell flour branded "Columbia."

For answer to interrogatories No. 1 and 2, these respondents say:

1. That since January 1st, 1883, and long prior thereto, they have sold flour not manufactured by the complainants branded with a mark or brand in which the word "Columbia" appeared, but how much or to whom they sold they are advised it is not necessary at the present time to state.

2. That since January 1st, 1883, they have not sold any flour as being Columbia flour. That they have sold a flour branded as stated herein but that it was not sold as the flour complainants call "Columbia," and if it be the desire of the complainants to interrogate these respondents as to the quantity of their flour branded as here-

inbefore mentioned, they have sold or offered for sale, and from whom these respondents obtained the flour, and to whom it 15 was sold, these respondents are advised that they are not required to answer, as it is not material or pertinent. That the respondent-, being the owner of the brands, alone are responsible for its use, and the information asked is not necessary for the relief prayed for nor would it in any way aid in the determination of the rights of the parties.

All of which matters and things the said respondents are ready to aver, maintain and prove as this honorable court shall direct, and hereby pray to be hence dismissed with their reasonable costs and charges in this behalf sustained.

WILLIAM W. ALCORN.
SAMUEL ALCORN.

STATE OF PENNSYLVANIA, } *ss:*
City of Philadelphia, }

William W. Alcorn, being duly sworn according to law, deposes and says that the facts set forth in the above answer are just and true.

WILLIAM W. ALCORN.

Sworn and subscribed to before me this second day of July, A. D. 1888.

EDWARD E. NICHOLAS,
Notary Public.

[SEAL.]

JAMES ALCORN,
JOHN G. JOHNSON,
Atty's for Respondents.

16 Endorsed: U. S. C. C. No. 14. April sess., 1888. In equity. Columbia Mill Co. *vs.* Wm. W. Alcorn, trading, &c. Answer of respondents. Filed July 2, 1888. Alcorn, Johnson, solicitors.

17 And afterwards, to wit, on the 16th day of July, A. D. 1888, the complainant, by its solicitor, comes into court here and files its replication in the words and figures following, to wit:

Circuit Court of the United States for the Eastern District of Pennsylvania.

COLUMBIA MILL COMPANY
vs. } In Equity.
WILLIAM W. ALCORN and SAMUEL ALCORN.

The replication of The Columbia Mill Company, complainant, to the answer of William W. Alcorn and Samuel Alcorn, defendants.

This replicant, saving and reserving unto itself all and all manner of benefit and advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, saith 18 that it will aver and prove its said bill to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver, maintain and prove, as this honorable court shall direct; and humbly prays as in and by its said bill it hath already prayed.

P. H. GUNCKEL,
Solicitor for Complainant.

19 (Endorsed:) U. S. circuit court, E. D. of Pa. Columbia Mill Co. *vs.* William W. Alcorn *et al.* In equity. Replication. Filed July 16, 1888. P. H. Gunckel, sol'r for compl't.

20 *Testimony on Behalf of Complainant.*

UNITED STATES OF AMERICA,
District of Minnesota, State of Minnesota, County of Hennepin, } *ss:*

Be it remembered that on the 11th day of September, A D. 1888, I, Charles E. Churchill, a notary public in and for the county and State aforesaid, and duly commissioned and qualified under the laws of the United States, to take depositions for use in the circuit court of the United States, did call and did cause to be and personally appeared before me at the office of Patrick H. Gunckel, rooms Nos. 522 and 523 Temple court, in the city of Minneapolis, in the State aforesaid, pursuant to the notice hereunto annexed, Ernst Zeidler, Horace S. Wade, Alfred V. Martin, Fred. C. Pillsbury, Frank R. Pettit, Llewellyn Christian, Frank E. Holmes, Henry W. Holmes, Albert C. Loring, William C. Crocker, Franklin L. Greenleaf, Henry B. Whitmore, Edwin R. Barber, Theodore A. Sammis, George S. Palmer and Gottleib Schober to testify and the truth to say 21 on the part of the complainant, in a certain suit or matter of controversy, now depending and undetermined in the circuit court of the United States for the eastern district of Pennsylvania, wherein The Columbia Mill Company is complainant and Wm. W. Alcorn and Samuel Alcorn are respondents.

And the said ERNST ZEIDLER, being of lawful age and having been by me first cautioned and sworn to testify the truth, the whole truth and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said Ernst Zeidler, and he did thereupon depose, testify and say in answer to interrogatories proposed to him by P. H. GUNCKEL, Esq., counsel for said complainant, as follows, to wit:

Q. 1. Please state your name, age, residence and occupation.

A. My name is Ernst Zeidler; age, forty-five years; residence, Minneapolis, Minnesota, and occupation, general manager and treasurer of the Columbia Mill Company.

Q. 2. How long have you been connected with the Columbia Mill Company?

A. Since the company was formed and the mill was started in 1882, and have been general manager and treasurer of the company every since that time.

Q. 3. What is the business of the Columbia Mill Company?

A. Grinding wheat and selling the product.

Q. 4. Does the complainant make flour from any other than spring wheat?

A. It does not.

Q. 5. Where is the flour mill of the complainant located?

A. In the city of Minneapolis.

22 Q. 6. State whether or not the complainant uses as a brand for flour of its manufacture a brand in which the word "Columbia" appears, and if so, please state during what period complainant has continuously used such brand.

A. It does use a brand containing the word "Columbia," and has continuously used such brand since about January, 1883.

Q. 7. Will you please attach to your deposition a fac-simile of the brand so used?

A. I will; and I will hand to the notary such fac-simile to be attached to my deposition and marked "Exhibit Complainant's Brand."

Q. 8. Upon what grade of flour has such brand been used by the complainant?

A. Upon its best grade and quality of flour only.

Q. 9. Can you state to what extent, and if so, please state, the complainant has used such brand for flour of its manufacture?

A. It has sold in the aggregate several millions of sacks and barrels so branded.

Q. 10. You may state generally where this flour is sold.

A. It is sold in every principal flour market in the United States, from Maine to Louisiana, and in the United Kingdom and Continental Europe.

Q. 11. Can you state approximately what quantity of such flour so branded has been sold in Philadelphia and its vicinity?

A. The complainant has sold in the course of the past five years and a half 250,000 and more packages containing that brand at Philadelphia and the territory immediately surrounding it, exclusive of flour sold from New York under this brand, and if we include New York, where these defendants have sold flour under their 23 brand "Columbia," as they set it up in their answer, this amount would be increased to more than half a million packages. I have given the amounts sold only in the territory in which we have come into competition with the defendants.

Q. 12. In what manner has this flour been sold by the complainant?

A. It has been sold principally through agencies established at Philadelphia and in the State of New Jersey and at New York city. Our agents at Philadepphia are Messrs. Linnard & Gibbs; at Newark, J. C. Smith & Company, and in New York, Grenville, Perrin & Co.

Q. 13. You may state, if you know, whether said brand "Columbia" has become of value to the complainant in the sale of its flour, and especially in the region about which we may have been talking?

A. It has become of great value to the complainant.

Q. 14. What, if any, information have you of interference with the complainant's trade in its Columbia flour in the region referred to by the defendants by reason of their sales of flour under a brand such as they allege in their answer they have been using?

A. Very frequent complaints have come to me, as manager, from the agencies at the points named of serious interference with the sale of complainant's "Columbia" flour; both the complainant and its agents have been to great expense and labor in establishing a reputation and creating a demand for this brand of flour in those markets; in some instances complaints also came to me from our agents that flour has been surreptitiously offered to the trade in their territory at less prices than the agents were able to sell at, and upon investigation it was found that such flour had been sold 24 by the defendants and was not the complainant's flour. And these matters have been the source of a great deal of annoyance as well as damage to both the agents and the complainant.

Q. 15. You may state whether or not these matters of which you speak have been such as to affect the sales of flour branded "Columbia" by the complainant in the territory named.

A. It has.

Q. 16. To what amount, in your opinion, has the complainant been damaged by the sale of the flour by the defendant, branded as alleged in their answer?

A. To the amount of $5,000.00.

Q. 17. Has the complainant at any time, or have its agents at any time, to your knowledge, sold to, or authorized sales by, the defendants of flour branded "Columbia"?

A. No.

Q. 18. Have you seen a fac-simile of the brand used by the defendants as admitted in their answer, and if so, what is your opinion as to whether or not its similarity to complainant's "Columbia" brand is such as to be calculated to mislead purchasers?

A. It is calculated to mislead the ordinary purchasers. The flour being generally known to the trade in that community merely as "Columbia" flour coming from Minneapolis, Minnesota, it would be very easy for purchasers who are not critical to be misled.

Q. 19. Do you know whether or not the flour branded by defendants, as they allege, is made in Minneapolis?

A. To the best of my knowledge it is not made in Minneapolis. I know it is not made at complainant's mill.

25 Q. 19*a*. Will you please give the names of all flour manufacture-s, either firms or individual-, who mill wheat flour in Minneapolis?

A. The flour manufacturers of Minneapolis are comprised in a list of firms and corporations as follows:

Washburn, Martin & Co.
Chas. A. Pillsbury & Co.
Pettit, Christian & Co.
Christian Bros. Mill Co.
Washburn Mill Co.
H. F. Brown & Co.
Morse & Sammis.
Stamwitz & Schober.
Sidle, Fletcher, Holmes Co.
Galaxy Mill Co.
Crocker, Fisk & Co.
Hinckle, Greenleaf & Co.
D. Morrison & Co.
D. R. Barber & Son.
A. W. Krech & Co.
The Columbia Mill Co.

These millers operate all the mills that manufacture wheat flour in Minneapolis, Minnesota.

Q. 20. Do you know of any flour manufacturer or dealer who, at the time of the adoption of the said "Columbia" brand by complainant, was using a brand for flour in which the word "Columbia" appeared?

A. No; I do not.

ERNST ZEIDLER.

Horace S. Wade, being of lawful age and having been by me first cautioned and sworn to testify the truth, the whole truth and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said Horace S. Wade, and he did thereupon depose, testify and say in answer to interrogatories proposed to him by P. H. Gunckel, Esq., counsel for complainant, as follows, to wit:

Q. 21. Please state your name, age, residence and occupation.

A. My name is Horace S. Wade; my age, thirty-seven
26 years; my occupation, vice-president and Eastern agent for the Columbia Mill Company, with headquarters at Boston, Mass., where I reside.

Q. 22. What are your duties and in what territory do you, and have you, operated as Eastern agent of the complainant?

A. I have general supervision of the sales in the territory included between Portland, Maine, and Pittsburg, Pennsylvania, exclusive of New York city and part of the State of New Jersey.

Q. 23. How much of the complainant's flour has been sold by you in the territory you designate during the period the complainant has been milling?

A. I have sold in all about three-quarters of a million packages, of which much the larger portion was branded "Columbia."

Q. 24. Does the amount sold by you as you have given it, include sales made to or through the agencies of the complainant at Philadelphia, New York city and in the State of New Jersey?

A. I have included in the amount sales made by me to Linnerd & Gibbs in Philadelphia, but have not included sales made to or through Grenville Perrin & Co., of New York city.

Q. 25. How frequently, if at all, have you visited Philadelphia in the matter of selling complainant's flour at that point?

A. About every two months I have visited Philadelphia in the interest of the sale of complainant's flour.

Q. 26. Are you acquainted with the reputation and the demand for the complainant's "Columbia" flour in Philadelphia and vicinity?

A. I am; I am personally acquainted with every prominent dealer
there, and such prominent firms as Samuel Bell & Sons, J. S. Wesley
& Son, J. W. Supplee & Co., Brecht & Hughes, Franklin Baker
27 & Co., and others have spoken to me in the highest terms of
the flour.

Q. 27. Are you acquainted with the defendants, William W. Alcorn and Samuel Alcorn?

A. I am.

Q. 28. What, if any, personal knowledge have you of the defendants selling or having on sale flour branded with the brand alleged in their answer?

A. Information came to me through the firm of Brecht & Hughes, of Philadelphia, that they were offered Columbia flour below the market price, and upon examination of the sample and inquiry, found that it was not the complainant's flour, and thereupon I went to see the defendants, on whose behalf the flour had been offered to Brecht & Hughes, and asked them if they were using a brand of Columbia flour. And upon their stating that they were, requested that they show me the brand, which they did. It was a brand similar to that described in defendants' answer. Feeling that the brand was one which could easily be mistaken by purchasers for the complainant's brand, I requested the defendants to stop using it, which, after some conversation, they agreed to do. Later, finding that they were still using this brand of flour, I again called upon them and told them that we would be compelled to sue them if they did not discontinue the use of the word Columbia as a flour brand, and after some discussion of the matter, they again promised to stop using it. These conversations took place within the past year.

Q. 29. Can you state whether or not the sales made by the defendants of flour branded with the "Columbia" brand which they used had any effect upon the sale of complainant's flour in the territory in which the defendants were selling?

28 A. Yes, it made our local agents discontented and caused
them to buy less flour than they would. Our experience has
been that our sales through agents in that territory have increased
from year to year, still, although the quality of the Columbia flour
was never better, our sales, after the interference by defendants, fell
off nearly one-half.

Q. 30. What has been and what is the customary mode of selling the complainant's "Columbia" flour to dealers in the section named?

A. At first to introduce it by samples and later on upon establishing its reputation, it is sold simply by the name "Columbia."

Q. 31. Do you know of any flour manufacturer or dealer who, at the time of the adoption of the said "Columbia" brand by complainant, was using a brand in which the word "Columbia" appeared?

A. No.

HORACE S. WADE.

Frank E. Holmes, being of lawful age and having been by me first cautioned and sworn to testify the truth, the whole truth and nothing but the truth, in the matter of the controversy aforesaid, I did carefully examine the said Frank E. Holmes, and he did thereupon depose, testify and say, in answer to interrogatories proposed to him by P. H. Gunckel, Esq., counsel for complainant, as follows, to wit:

Q. 32. Please state your name, age, residence and occupation.

A. My name is Frank E. Holmes; age, 26 years; residence, Minneapolis, Minnesota, and occupation, manager of the Washburn Mill Company.

Q. 33. What is the business of the Washburn Mill Company?

A. Manufacturing flour.

29 Q. 34. Are you acquainted with all of the brands that have been used upon flour by the Washburn Mill Company in the past three or four years?

A. Yes.

Q. 35. Do you know whether or not the Washburn Mill Company has branded for the defendants, W. W. Alcorn & Company, any flour with a brand containing the word "Columbia"?

A. I know that they have not. And that company has had no transactions with the defendants.

Q. 36. What mill or mills does the Washburn Mill Company operate?

A. The Palisade mill, of Minneapolis, and Lincoln mill at Anoka, Minnesota.

FRANK E. HOLMES.

Franklin L. Greenleaf, being of lawful age and having been by me first cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Franklin L. Greenleaf, and he did thereupon depose, testify and say, in answer to interrogatories proposed to him by P. H. Gunckel, counsel for the complainant, as follows, to wit:

Q. 37. Please state your name, age, residence and occupation?

A. My name is Franklin L. Greenleaf; age, 40; residence, Minneapolis, and occupation, merchant miller. I am a partner in the firm of Hinckle, Greenleaf & Company, and also a partner in the firm of H. F. Brown & Company, operating the Dakota mill.

Q. 38. Where are the mills located that you are connected with

A. In Minneapolis.

Q. 39. Are you familiar with the brands used by both the firms of which you are a member, in branding their flour?

30 A. I am.

Q. 40. Do you know whether or not either of the firms of which you are a member have, at any time, branded flour for or at the request of the defendants with a brand in which appeared the word "Columbia"?

A. They never have. Neither of these firms have had any dealings with the firm of W. W. Alcorn & Company.

FRANKLIN L. GREENLEAF.

Fred. C. Pillsbury, being of lawful age and having been by me first cautioned and sworn to testify the truth, the whole truth and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said Fred. C. Pillsbury and he did thereupon depose, testify and say, in answer to interrogatories proposed to him by P. H. Gunckel, Esq., counsel for the complainant, as follows, to wit:

Q. 41. Please state your name, age, residence and occupation?

A. My name is Fred. C. Pillsbury; age, 36 years; residence, Minneapolis, Minnesota; occupation, miller. I am a partner of the firm of Charles A. Pillsbury & Company.

Q. 42. What mills does the firm of Charles A. Pillsbury & Co. operate and where are they located?

A. Pillsbury A and Pillsbury B and Anchor mills, all located in Minneapolis, Minnesota.

Q. 43. Have any of the mills you have named at any time branded flour for the defendants with a brand containing the word "Columbia"?

A. They have not.

FRED. C. PILLSBURY.

31 Henry B. Whitmore, being of lawful age and having been by me first cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the matter in controversy aforesaid, I did carefully examine the said Henry B. Whitmore, and he did thereupon depose, testify and say, in answer to interrogatories proposed to him by P. H. Gunckel, Esq., counsel for the complainant, as follows, to wit:

Q. 44. Please state your name, age, residence, and occupation?

A. My name is Henry B. Whitmore; age, 37 years; residence, Minneapolis, Minnesota, and occupation, miller. I am a member of the firm of D. Morrison & Co., millers.

Q. 45. What mill or mills does the firm of D. Morrison & Co. operate, and where is such mill or are such mills located?

A. The Standard mill, located in Minneapolis,-Minnesota.

Q. 46. If you know, please state whether or not the firm of D. Morrison & Co., of which you are a member, has at any time branded flour with a brand containing the word "Columbia"?

A. It has not at any time.

Q. 47. Does your firm sell any flour to or upon the orders of defendants, W. W. Alcorn & Co.?

A. Not at present and have not for several years.

HENRY B. WHITMORE.

THEODORE A. SAMMIS, being of lawful age and having been by me first cautioned and sworn to testify the truth, the whole truth and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said Theodore A. Sammis, and he did thereupon depose, testify and say in answer to interrogatories proposed to him by P. H. GUNCKEL, Esq., counsel for the complainant, as follows, to wit:

32 Q. 48. Please state your name, age, residence, and occupation.

A. My name is Theodore A. Sammis; age, forty-one; residence, Minneapolis, Minnesota; occupation, miller. I am a member of the firm of Morse & Sammis, millers, of Minneapolis.

Q. 49. Where is the mill of your firm located?

A. In the city of Minneapolis.

Q. 50. Have you at any time branded any flour for the defendants, or sold to them any flour which was branded with a brand containing the word "Columbia"?

A. No, we have not. We have never used the brand "Columbia" at all.

THEODORE A. SAMMIS.

LLEWLLYN CHRISTIAN, being of lawful age and having been by me first cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Llewllyn Christian, and he did thereupon depose, testify and say, in answer to interrogatories proposed by P. H. GUNCKEL, Esq., counsel for complainant, as follows, to wit:

Q. 51. Please state your name, age, residence and occupation.

A. My name is Llewllyn Christian; age, forty-seven; residence, Minneapolis; occupation, miller, and am a member of the firm of Christian Bros. Mill Company.

Q. 52. Please state where the mills of your company are located?

A. At Minneapolis, Minnesota.

Q. 53. Please state whether or not your firm or corporation has at any time shipped flour to the defendants, or shipped flour upon their order, which was branded with a brand containing the word "Columbia." 33

A. We have not. We have never had any dealings with the defendants that I know of.

LLEWLLYN CHRISTIAN.

GOTTLIEB SCHOBER, being of lawful age and having been by me first cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the matter in controversy aforesaid, I did carefully examine the said Gottlieb Schober, and he did thereupon depose, testify and say, in answer to interrogatories proposed to him by P. H. GUNCKEL, Esq., counsel for the complainant, as follows, to wit:

Q. 54. Please state your name, age, residence and occupation.

A. My name is Gottlieb Schober; age, 54 years; residence, Minneapolis, Minnesota, and occupation, miller, and am a member of the firm of Stamwitz & Schober, millers, at Minneapolis.

Q. 55. Where is your mill located?

A. At Minneapolis, Minnesota.

Q. 56. You may please state whether or not your firm has at any time sold to or branded for the defendants, W. W. Alcorn & Co., flour marked with a brand containing the word "Columbia"?

A. No. We have never had any dealings with this firm to my knowledge.

GOTTLIEB SCHOBER.

GEORGE S. PALMER, being of lawful age and having been by me first cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said George S. Palmer, and he did 34 thereupon depose, testify and say, in answer to interrogatories proposed to him by P. H. GUNCKEL, Esq., counsel for the complainant, as follows, to wit:

Q. 57. Please state your name, age, residence and occupation.

A. My name is George S. Palmer; age, 26; residence, Minneapolis, Minnesota, and occupation, miller. I am a member of the firm of A. W. Krech & Co.

Q. 58. Where are the mills of that firm located?

A. In Minneapolis, Minnesota.

Q. 59. Has your firm at any time sold to the defendants or branded for them flour with a brand in which appeared the word "Columbia"?

A. It has not.

GEORGE S. PALMER.

EDWIN R. BARBER, being of lawful age and having been by me first cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Edwin R. Barber, and he did thereupon depose, testify and say, in answer to interrogatories proposed by P. H. GUNCKEL, Esq., counsel for complainant, as follows, to wit:

Q. 60. Please state your name, age, residence and occupation.

A. My name is Edwin R. Barber; age, thirty-six; residence, Minneapolis, and occupation, merchant miller and member of the firm of D. R. Barber & Son, millers, at Minneapolis.

Q. 61. Are you acquainted with the brands that have been placed upon flour by your firm in the past four or five years?

A. Yes, sir.

Q. 62. Will you please state whether or not your firm has 35 branded flour for the defendants with a brand containing the word "Columbia" or sold or shipped to them any flour so branded?

A. No, sir. We have never used that brand on any flour.

EDWIN R. BARBER.

WILLIAM S. CROCKER, being of lawful age and being by me first cautioned and sworn to testify the truth, the whole truth and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said William G. Crocker, and he did thereupon depose, testify and say in answer to interrogatories proposed to him by P. H. GUNCKEL, Esq., counsel for the complainant, as follows, to wit:

Q. 63. Please state your name, age, residence and occupation.

A. My name is William G. Crocker; age, 24; residence, Minneapolis, Minnesota, and occupation at present manager of the firm of Crocker, Fisk & Co., millers, of Minneapolis.

Q. 64. You may please state whether your firm has at any time branded flour with a brand containing the word "Columbia" for the defendants, or sold to or shipped to defendants any flour so branded.

A. No, we have not.

Q. 65. Are you acquainted with all the brands that have been used by your company in the past four or five years?

A. Yes.

WILLIAM G. CROCKER.

ALFRED V. MARTIN, being of lawful age and having been by me first cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Alfred V. Martin, and he did
36 thereupon depose, testify and say, in answer to interrogatories proposed to him by P. H. GUNCKEL, Esq., counsel for the complainant, as follows, to wit:

Q. 66. Please state your name, age, residence and occupation.

A. My name is Alfred V. Martin; age, 38; residence, Minneapolis, Minnesota; occupation, merchant miller, a member of the firm of Washburn, Martin & Co., millers, of Minneapolis. This firm is the successor of Washburn, Crosby & Co.

Q. 67. Were you a member of the last-named firm?

A. I was.

Q. 68. Are you acquainted with the various brands that have been used by the two firms of which you were a member for the past three or four years?

A. Yes, I am familiar with them.

Q. 69. Will you please state whether your present firm or its predecessor at any time branded flour for the defendants with a brand in which appeared the word "Columbia," or sold to or shipped to the order of the defendants any flour so branded?

A. I can say positively that they did not.

Q. 70. Can you name the various flour-manufacturing concerns, either partnerships, corporations or individuals, operating mills in Minneapolis, Minnesota?

A. Washburn, Martin & Co., Pettit, Christian & Co., Christian Bros. Mill Co., Washburn Mill Co., Sidle, Fletcher, Holmes & Co., Galaxy Mill Co., Crocker, Fisk & Co., Hinckle, Greenleaf & Co., D.

Morrison & Co., D. R. Barber & Son, H. F. Brown & Co., Morse & Sammis, A. W. Krech & Co., Stamwitz & Schober, Columbia Mill Co. comprise all the manufacturers of flour operating mills in Minneapolis.

ALFRED V. MARTIN.

37 FRANK R. PETTIT, being of lawful age and having been by me first cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the matter in controversy aforesaid, I did carefully examine the said Frank R. Pettit, and he did thereupon depose, testify and say, in answer to interrogatories proposed to him by P. H. GUNCKEL, Esq., counsel for the complainant, as follows, to wit:

Q. 71. Please state your name, age, residence and occupation.

A. My name is Frank R. Pettit; age, 35; residence, Minneapolis, Minnesota; occupation, merchant miller, and am a member of the firm of Pettit, Christian & Co., and am general manager of that firm.

Q. 72. What is the business of your firm?

A. Merchant flour-milling, at Minneapolis, Minnesota. We operate the Pettit and Zenith mills.

Q. 73. Are you acquainted with the various brands that have been used by your firm for the past four or five years?

A. Yes.

Q. 74. Please state whether or not your firm has, at any time, branded flour for the defendants with a brand containing the word "Columbia," or has at any time sold to or shipped to defendants flour so branded.

A. We have not. We have never had any dealings whatever with the defendants.

FRANK R. PETTIT.

HENRY W. HOLMES, being of lawful age, and having been by me first cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Henry W. Holmes, and he did 38 thereupon depose, testify and say, in answer to interrogatories proposed to him by P. H. GUNCKEL, Esq., counsel for the complain-t, as follows, to wit:

Q. 75. Please state your name, age, residence, and occupation.

A. My name is Henry W. Holmes, age 42, residence Minneapolis, Minnesota, occupation miller, member of the corporation of Sidel, Fletcher, Holmes Company. I am its general manager.

Q. 76. What is the business of that corporation?

A. Manufacturing flour at Minneapolis, Minnesota.

Q. 77. Are you acquainted with the various brands used by that company for flour within the past four or five years?

A. I am fully so.

Q. 78. Will you please state whether your company has at any time branded flour for the defendants, Alcorn & Company, with a brand in which the word "Columbia" appears, or has at any time shipped to, or to the order of, said defendants any flour so branded?

A. I am very positive they have not.

Q. 79. Are you sufficiently acquainted with the flour markets of Philadelphia to be able to state whether or not the complainant's "Columbia" flour is known in those markets as a standard flour?

A. I am. The Columbia flour is a standard flour.

HENRY W. HOLMES.

ALBERT C. LORING, being of lawful age and having been by me first cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Albert C. Loring, and he did there- 39 upon depose, testify and say, in answer to interrogatories proposed to him by P. H. GUNCKEL, Esq., counsel for the complainant, as follows, to wit:

Q. 80. Please state your name, age, residence and occupation.

A. My name is Albert C. Loring; age, thirty years; residence, Wayzata, Hennepin county, Minnesota, and occupation, miller. I am secretary and treasurer of the Galaxy Mill Company, of Minneapolis, Minnesota.

Q. 81. Are you familiar with the brands used for flour by your company for the past four or five years?

A. Yes, sir.

Q. 82. If you know, will you please state whether or not the Galaxy Mill Company has branded any flour for the defendants, Alcorn & Co., with a brand in which appeared the word "Columbia," or at any time shipped to or to the order of the said Alcorn & Co. any flour so branded?

A. I have no knowledge of the use of that brand by the Galaxy Mill Company.

ALBERT C. LORING.

STATE OF MINNESOTA, }
County of Hennepin, } *ss:*

I, Charles E. Churchill, a notary public in and for the State and county aforesaid, and duly commissioned and qualified under the laws of the United States to take depositions for use in the circuit courts of the United States, do hereby certify, that the reason for taking the foregoing depositions is, and the fact is, that the testimony of said witnesses is material and necessary for the plaintiff in the cause in the caption of the said depositions named, and that 40 all of the said witnesses except the said Horace S. Wade, live and did live at the time of taking the said depositions, in the city of Minneapolis, county of Hennepin, and State of Minnesota, the same being at a greater distance than one hundred miles from the city of Philadelphia, State of Pennsylvania, where the court, at which it is expected the said cause will be tried, was appointed by law to be held; to wit: more than 1,250 miles therefrom; and the said Horace S. Wade lives and did live at the time of taking said depositions, in the city of Boston, State of Massachusetts, the same being at a greater distance than 100 miles from the said city of Philadelphia, to wit: more than 325 miles therefrom.

I further certify that a notification of the time and place of taking the said depositions, signed by the complainant's solicitor was made out and was served on James Alcorn, Esq., the solicitor for the respondents, on the 31st day of August, 1888, to be present at the taking of said depositions and to put interrogatories, if he might think fit.

And I certify that the said notification, with proof of service endorsed thereon, is hereto annexed.

I further certify, that on the 11th, 12th, 13th, 14th, 15th, 17th and 18th days of September, A. D. 1888, I was attended at the office of P. H. Gunckel, rooms 522 and 523 Temple Court building, in the city of Minneapolis, State of Minnesota aforesaid, by P. H. Gunckel, Esq., the solicitor for the complainant, and the witnesses, Alfred V. Martin, Fred. C. Pillsbury, Frank R. Pettit, Llewllyn Christian, Frank E. Holmes, Henry W. Holmes, Albert C. Loring, William G. Crocker, Franklin R. Greenleaf, Henry B. Whitmore, Edwin R. Barber, Theodore A. Sammis, George S. Palmer, Gottlieb Schober, Ernst Zeidler and Horace S. Wade, who were of sound mind and lawful age, and the witnesses were by me carefully examined 41 and cautioned and sworn to testify the truth, the whole truth and nothing but the truth, and the depositions were by me reduced to writing in the presence of the witnesses and from their statements, and after carefully reading the same to the witnesses, they subscribed the same in my presence.

And I certify that the taking of the depositions of the said witnesses was commenced on the 11th day of September, 1888, and was proceeded with on each of said 11th, 12th, 13th, 14th, 15th, 17th and 18th days of September, between the hours of 9 a. m. and 6 p. m. of said days, and was adjourned by me at the close of each of said days to 9 o'clock in the forenoon of the next succeeding day of the days above mentioned.

I have retained the said depositions in my possession for the purpose of sealing up and directing the same, with this certificate of the reasons aforesaid for taking said depositions with my own hand to the court for which the same were taken.

And I do further certify that I am not of counsel nor attorney for either of the parties in said depositions and caption named, or in any way interested in the event of the said cause named in said caption.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 18th day of September, A. D. 1888.

[NOTARIAL SEAL.] CHARLES E. CHURCHILL,
Notary Public, Hennepin Co., Minnesota.

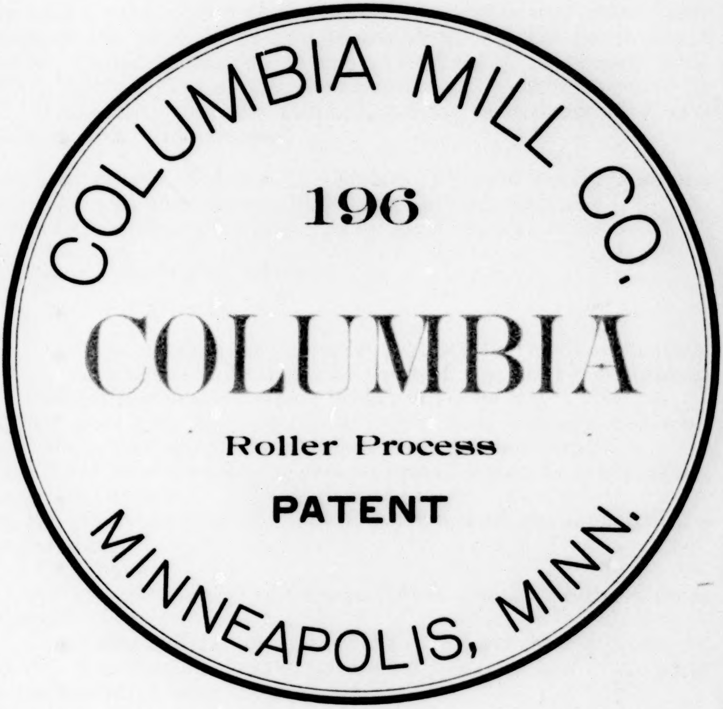
(Here follows brand marked p. 42.)

Circuit Court of the United States for the Eastern District of Pa.

COLUMBIA MILL CO.
vs.
WILLIAM W. ALCORN *et al.*
In Equity. p. 42

Complainant's Exhibit. Complainant's Brand.

Reduced fac simile of brand.



COLUMBIA MILL CO.

196

COLUMBIA

Roller Process

PATENT

MINNEAPOLIS, MINN.

43 Circuit Court of the United States for the Eastern District of Pennsylvania.

THE COLUMBIA MILL COMPANY
vs.
WILLIAM W. ALCORN *et al.*

STATE OF PENNSYLVANIA,
City and County of Philadelphia, } *ss:*

Depositions of sundry witnesses on behalf of complainant in the above cause taken before me, Edward E. Nicholas, a notary public in and for the county and city of Philadelphia and State aforesaid, at the office of James Alcorn, Esq., No. 223 South Sixth street, Philadelphia, Pennsylvania, on Friday, September 28th, 1888, by consent of parties, the complainant being represented by P. H. Gunckel, Esq., its counsel, and the defendants by James Alcorn, Esq., their counsel.

And thereupon, EUGENE T. LINNARD being of lawful age, and having been by me first cautioned and duly affirmed did testify in answer to interrogatories proposed by Mr. GUNCKEL as follows:

EUGENE T. LINNARD, affirmed.

By Mr. GUNCKEL:

Q. 83. Please state your name, age, residence and occupation.

44 A. Eugene T. Linnerd, 37 years of age, flour merchant, at No. 4617 Chester avenue, West Philadelphia.

Q. 84. How long have you been in the flour business and with whom if any one are you now engaged in such business?

A. About 12 years with the present firm of which I am a member, Linnard & Gibbs.

Q. 85. Has your firm of Linnard & Gibbs had dealings with the complainant?

A. They have.

Q. 86. For what length of time and what was the nature of these dealings?

A. Since about March or April, 1883. The purchase of flour.

Q. 86. Was the flour you so purchased branded, and if so, what was the brand, or were the brands?

A. We purchased a large majority of it branded "Columbia."

Q. 87. You may state if you please in what territory you sold the flour, you so purchased from complainant.

A. States of New Jersey, Pennsylvania and Delaware.

Q. 88. To what extent has your firm bought and sold flour of the complainant's branded "Columbia"?

A. About thirty thousand barrels; of course there was more packages than that, but that is about the number that was branded "Columbia." There was other flour bought not branded "Columbia."

Q. 89. You spoke of packages; you may tell if the flour bought by you was in barrels solely or partly, in other packages, and if so, how many of such packages were there.

45 A. The flour bought was partly in barrels and partly in sacks.

Q. 90. What proportion of it, approximately, was in barrels?

A. The larger part of it, certainly three-fourths.

Q. 91. What is the nature of the business conducted by your firm. I mean in a general way. To whom do you sell flour, to other dealers, or to consumers?

A. We sell it largely to bakers and other flour dealers, such as grocers, and also in barrels to families.

Q. 92. What, if any, knowledge have you of sales of flour being made by the defendants that was branded as alleged in their answer?

A. Most of my knowledge is from what I have heard.

Q. 93. Do you know whether or not the defendants reached the same customers in selling their flour branded "Columbia" as you sell to?

A. Yes, both cater to the same trade.

Q. 94. Have you any knowledge of flour of defendants' branded as they allege in the answer being sold to persons who were customers of your firm?

A. I know of at least one case where such a sale was made to a customer of mine, sold as "Columbia" flour. Cannot say it was branded "Columbia" flour.

Q. 95. Can you say whether or not complainant's "Columbia" brand of flour is regarded as standard flour in this market and whether there is a demand for it?

A. In my judgment it is so regarded and there is a demand for it.

By Mr. ALCORN: Witness is to be produced by arrangement for cross-examination and is required to produce his books 46 showing the purchases from the complainants and also the sales of the complainants' flour branded Columbia.

EUGENE T. LINNARD.

HORACE B. DELANEY, being of lawful age and having been by me first cautioned and duly sworn did testify, in answer to interrogatories proposed by Mr. GUNCKEL, Esq., as follows:

HORACE B. DELANEY, sworn.

By Mr. GUNCKEL:

Q. 96. Please state your name, age, residence and occupation.

A. Horace B. Delaney; thirty years of age; salesman for Linnard & Gibbs, 347 N. Nineteenth street.

Q. 97. How long have you been a salesman for Linnard & Gibbs?

A. I went in their employ in March, 1886—about two years and a half.

Q. 98. Have you, as salesman, had anything to do with sales of complainant's flour branded "Columbia"?

A. Yes, sir.

Q. 99. In what territory were such sales made?

A. Pennsylvania, Delaware and some little in New Jersey.

Q. 100. Can you state approximately how much flour you yourself sold for your firm that was so branded?

A. I will give you a rough guess—I suppose about seven or eight thousand barrels.

Q. 101. Were the sales made by you to consumers or dealers?

A. To bakers principally.

47 Q. 102. Have you examined the books of your firm to ascertain the quantity of the complainant's flour that has been handled by the firm?

A. I have.

Q. 103. What did you find to be the quantity of such flour bought and sold by your firm?

A. I made it forty-five thousand packages.

Q. 104. Do you know whether defendants sold flour containing the brand Columbia in the same territory and to the same persons who are the customers of the firm of Linnard & Gibbs?

A. I do.

Q. 105. Have you seen in the hands of dealers or users any packages of flour that were branded with the brand such as defendants allege in their answer?

A. I have.

Q. 106. When and where?

A. I saw it first in October, or about October, 1887, in Delaware, in the store of J. George Staib.

Q. 107. Was this man, J. George Stab, a customer of your firm at that time?

A. Yes, sir, and previous to that time.

Q. 108. You may state, if you know, whether the selling or offering for sale of such flour by the defendants has interferred with your sales of the complainant's Columbia flour.

A. To a certaint extent it has.

HORACE B. DELANEY.

By Mr. Alcorn:

Witness is to be produced by arrangement for cross-examination and is required to produce his books showing the purchases from the complainants and also the sales of complainant's flour branded "Columbia."

Mr. Alcorn, on this 2d day of October, states that they waive for the present the cross-examination of both witnesses.

48 State of Pennsylvania,
City and County of Philadelphia, } *ss:*

I, Edward E. Nicholas, notary public in and for the city, county, and State aforesaid, being duly commissioned and qualified under the laws of the United States to take depositions for use in the circuit court of the United States, do hereby certify, that the foregoing depositions of Eugene T. Linnard and Horace B. Delaney were taken before me at the office of James Alcorn, Esq., No. 223 S. Sixth street, Philadelphia, Pennsylvania, on the 28th day of September, 1888, by agreement of counsel for claimant and respondents in the cause named in the caption, and I further certify that during the taking of the testimony counsel for both parties attended. And I certify that the said Eugene T. Linnard and Horace B. Delaney were by me carefully examined and sworn to testify the truth, the whole truth and nothing but the truth, and that the depositions were reduced by me to writing in the presence of the witnesses and from their statement, and after carefully reading the same to the witnesses they subscribed the same in my presence. I have retained the said depositions in my possession for the purpose of sealing up and delivering the same with this certificate with my own hand to the court for which the same were takēn, and I do further certify that I am not of counsel nor attorney for either of the said parties in said depositions and caption named, or in any way interested in the said cause named in the said caption.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 3rd day of October, A. D. 1888.

EDWARD E. NICHOLAS,
[NOTARIAL SEAL.] *Notary Public.*

49 Circuit Court of the United States for the Eastern District of Pennsylvania.

THE COLUMBIA MILL COMPANY
vs. } In Equity.
WILLIAM W. ALCORN *et al.*

Testimony on the part of complainants, taken before John A. Shields, special examiner, in the above-entitled cause, as per stipulation hereto annexed, at his office, room No. 78, post-office building, in the city of New York, Monday, October 8th, 1888.

Appearances: P. H. Gunckle, Esq., solicitor for complainants; J. Alcorn, Esq., solicitor for defendants.

GRENVILLE PERRIN, a witness sworn on behalf of complainants, deposes and says:

Direct examination by Mr. GUNCKEL:

Q. 109. Please state your name, age, residence and occupation.
A. Grenville Perrin; I am 47 years of age; I reside in Brooklyn; I am a commission merchant.
Q. 110. Where do you carry on your business?
A. Produce exchange, New York.
Q. 111. What class of merchandise do you deal in?
A. Flour and grain.

Q. 112. Have you or have you not had dealings with com-
50 plainant in connection with the sale of its flour, and espe-
cially with that portion of it which is branded with its "Co-
lumbia" brand?

A. I have.

Q. 113. Can you state approximately what quantity of its said "Columbia" brand of flour you have handled?

A. I am not able to state approximately or specifically the amount I have handled, because during the first two years or two years and a half of handling it I was in charge of the flour department of the firm of Heusted & Hazeltine, of this city. I kept no record of my own as to the quantity sold during that time, as all such records were kept in the books of the firm. That firm has now dissolved—has been for upwards of two years, I think—and I have no means of knowing where said books of the firm are or how they could be reached. Since the 1st of May, 1885, the transactions in the said flour are recorded in the books of my present firm from which I could obtain the record of the amount if necessary, but I could not state specifically now; it would be a matter of guess-work.

Q. 114. I should like to know whether the quantity so sold has been considerable or insignificant?

Mr. Alcorn objects to the question as being leading.

A. We have handled considerable of it.

Q. 115. Within what territorial limits have you been selling it?

A. New York and New Jersey.

Q. 116. Do you know whether or not complainant's "Columbia" brand of flour has an established reputation in this market?

A. I know that it has.

Q. 117. How is it regarded as to quality?

A. It is the first-class spring wheat patent flour.

51 Q. 118. Will you kindly explain briefly what is meant by
the use of the word "patent" in connection with flour?

A. Briefly it is the best grade the mill makes.

Q. 119. Have you seen the brand used by the defendants as admitted in their answer?

A. I have seen a brand answering to that general description.

Q. 120. Where and when did you see it?

A. I saw it on a barrel head in this city during the past year.

(It is agreed between counsel that the testimony from this point may be taken by a stenographer.)

Q. 121. Was that the only instance in which you have seen such brand?

A. No, sir.

Q. 122. Where else have you seen it?

A. In New Brunswick, New Jersey.

Q. 123. What color was it?

A. Red and blue.

Q. 124. In whose hands was it?

A. I think the style of the firm is Runyon & Sons, or Runyon's Sons; I am not certain.

Q. 125. Have you any information as to where that flour came from?

A. I was told by one of the firm that it was purchased of Alcorn & Co. of Philadelphia.

Objected to as hearsay.

Q. 126. When was that?

A. During last summer.

Q. 127. In your opinion would or would not such brand be calculated to mislead ordinary purchasers?

A. Possibly.

52 Q. 128. Do you know whether or not complaints have been made because of the sale of flour containing the brand alleged in the defendants' answer in this community—complaints either to the complainant or to its agents?

A. I can only answer what I know myself, and that is, complaints have been made to me that there was a brand closely imitating that of the "Columbia" Mill Company of Minneapolis, which was being offered in competition with our brand, and I say this in explanation of my answer to the previous question which I answered "Possibly." I was asked if it were likely to mislead ordinary purchasers. I am not fully certain as to what the counsel meant by "ordinary purchasers." It would mislead those who had heard of the "Columbia" flour and were purchasing it on its brand—on its name. That is my opinion as the agent of the flour and having handled it.

Q. 129. Can you state whether the sales of such flour by the defendants had any effect upon the complainant's sales of flour in this community during the time the defendants were so selling?

A. Its interference was to the extent of being an imitation, in my judgment, of the brand of the complainant, and being sold at a lower price, thereby creating dissatisfaction among those who bought the genuine flour as "Columbia" flour, and the very first knowledge I had of it was the fact that the "Columbia" brand—before I knew there was another one in existence—was offered at prices below which we were selling direct from the mills at first hand, thereby interfering with our trade in the brands.

Cross-examination by Mr. ALCORN:

C. Q. 130. Mr. Perrin, from whom did the complaints come about the Columbia flour?

53 A. I think first to me from Messrs. J. C. Smith & Co., of Newark, New Jersey, who were buying Columbia flour largely of me as the representative of the mill.

C. Q. 131. They are the agents of the Columbia Mill Company in Newark, New Jersey, are they not?

A. They have the control of the brand there.

C. Q. 132. Did any complaints come to you from any dealers in the flour—bakers, grocers or wholesale dealers?

A. They are wholesale dealers.

C. Q. 133. Outside of them?

A. I don't come in contact with the other class, bakers or grocers; I don't sell to them.

C. Q. 134. Would the brand mislead you?

A. No, sir; because I know there is a very slight variation from the original brand; it wouldn't mislead me if there was a difference of one word.

C. Q. 135. If the upper circle had "Columbia mill" and the imitated one "hard wheat" and the brand across "Columbia" in yours, and in the other "Columbia patent" in black letters, isn't there more than a slight difference between the two brands?

A. I consider that there was in the black brand but not in the red one.

C. Q. 136. Then what you think of probably misleading people is the red and blue brand?

A. No, sir; before I heard of the red and blue brand, the misleading part to my mind was the offering of Columbia flour by Messrs. Alcorns' agents; that is the way it came to me from those to whom I have sold, who are wholesale dealers.

C. Q. 137. The only complaint as I understand you, then, was from Mr. Smith, of Newark, to you?

A. No, sir; I don't say that was the only one; I think that was the first one.

C. Q. 138. What other complaints were there?

54 A. I remember one specifically of a wholesale dealer in New York who has died within sixty days, a Mr. Coombs, who claimed to me that Columbia flour was offered in Jersey to customers of his at a lower price than I was willing to sell him at; and subsequent to that, I didn't demonstrate it fully, but practically to my satisfaction, that Thurber, Whyland & Co., of New York, had offered it, and I learned afterwards from Mr. Thurber that he was buying the "Columbia" brand of Alcorn and having it consigned to him.

C. Q. 139. Is that the only place in the city of New York where you knew it had been obtained from Alcorn & Co.—Thurber, Whyland & Co.?

A. That is the one that I know of, speaking of my own knowledge.

C. Q. 140. Is that where you saw the barrel head that you speak of?

A. No, sir; I saw the barrel head in my office; it was sent to me at my request.

C. Q. 141. You didn't see the barrel head then in any dealer's place?

A. No, sir; I did not.

C. Q. 142. And where did that barrel head come from, do you know?

A. It was sent to me from Newark by Messrs. J. C. Smith & Co., at my request.

C. Q. 143. Sent to you by your agents from Newark?

A. By Messrs. J. C. Smith & Co., at my request.

C. Q. 144. Messrs. Runyon & Co., that you speak of in New Brunswick, are they customers of yours?

A. No, sir; I never sold them a barrel.

55 C. Q. 145. What brand of flour do you receive from the Columbia Mill Company, Mr. Perrin, or have you received in the past two years?

A. Principally "Columbia."

C. Q. 146. What other brand?

A. Some of their bakers' brand—the American—another grade, a lower grade.

C. Q. 147. Any patent of another brand than Columbia?

A. I have never received any patent of another brand. I have sold their flour on which they have, as all other mills do, put, at the request of a purchaser, a purchaser's brand, at times.

C. Q. 148. I understand you have sold this same flour under a different brand than Columbia—the same brand of flour?

A. O, yes, sir; certainly. My answer was that I had sold the flour to dealers, and, at their request, had sometimes, as all mills do, put their private mark on it.

C. Q. 149. Was the flour received by you in barrels, or in barrels and sacks?

A. In barrels.

C. Q. 150. Only in barrels?

A. Only in barrels. You say received by me?

C. Q. 151. I don't mean to say that you actually, physically got it, but sold by you.

A. I would like to explain that in this way: The receivers or commission men receive flour received by them very largely as flour consigned; they may make sales from the mill which, by request of the purchaser, would have a part of a car or a whole car with some purchaser's brand on it. That is the explanation of my former answer, and, of course, I have sold it to be packed in sacks with the Columbia brand on as well as the barrels.

56 C. Q. 152. Can you approximate how many barrels of spring-wheat patents are consumed in New York or brought to New York?

A. No, sir.

C. Q. 153. Is there any method, by the brand, in the trade of designating spring and winter wheat patents?

A. Generally.

C. Q. 154. How are they designated?

A. Winter-wheat flour generally has upon the barrel head the section of the country in which it is made; spring wheat the same, and dealers, of course, judge by that as far as outward appearance goes.

C. Q. 154*a*. What is that section usually?

A. Well, I can't name them all. I can say in a general way that flour made in Ohio, Indiana, Illinois, Missouri, Michigan, Pennsylvania and New York are generally winter-wheat flours. Winter-wheat flour is made somewhere else, but these are the principal places. Flour made in Minnesota, Dakota and Wisconsin, or purporting to be, is generally spring-wheat flour.

C. Q. 155. Are there any customers of yours, directly wholesale dealers or otherwise, that Alcorn & Co. sell flour to?

A. I don't know.

C. Q. 156. And when you say the sale of Alcorn & Co.'s "Columbia patent" has interfered with the sale of the Columbia Mill Company's "Columbia," will you please state in what respect it has?

A. Did I say it would interfere with its sale?

C. Q. 157. I understood you to say so in answer to Mr. Gunckle.

(The answer to question 21 is read over, and the witness says: That is my reason; I can't make it any fuller than that.)

57 C. Q. 158. Did you fail to sell to anybody on account of the sale made by Alcorn & Co., of "Columbia patent"?

A. I don't know that I did, sir. I endeavored to counteract the effect. Some of my customers claimed that they were unable to place "Columbia," because the same brand was offered by Alcorn & Co. at lower figures, thereby creating a distrust in the minds of their customers, who were small dealers, that they were charging too high a price for the brand.

C. Q. 159. How do you know, Mr. Perrin, that the flour of Alcorn & Co. was offered or sold at a lower price than the price of the Columbia Mill Company flour?

A. Simply what my customers told me.

C. Q. 160. Only by what your customers told you?

A. Yes, sir; we are not purchasers ourselves as a rule.

C. Q. 161. You buy from the mill, and then sell to wholesale dealers, I understand?

A. No, sir; we handle this flour by arrangement with the mill, you might say practically on commission; we don't purchase the flour of the Columbia mill; we act as their agents.

C. Q. 162. The price of the flour is increased by the profit to you, is it not, before it reaches your customers?

A. In the same way that the price of any man's goods is increased by what he pays his salesmen for selling it, and what it costs him to run his store; that is my reply. I don't wish it to be understood that we purchase the flour of the Columbia Mill Company and resell it at a profit; we don't; we return to the mill every dollar we get for it, less the amount paid us as a commission for handling the same.

58 C. Q. 163. And you sell to people like J. C. Smith, of Newark?

A. We sell to wholesale dealers and jobbers generally.

C. Q. 164. And the people to whom Alcorn & Co. sell are generally customers of such men as J. C. Smith, of Newark?

A. I don't know what their business is.

C. Q. 165. But, from the knowledge which you have received of complaints, it was from the people to whom J. C. Smith & Co. sold, or such people?

A. Those were the complaints that came from J. C. Smith & Co.

C. Q. 166. Their customers complained?

A. They complained to me.

C. Q. 167. Their customers complained to them?

A. I presume so.

C. Q. 168. What are the principal spring-wheat flours in this market—spring-wheat patents?

A. That thing to flour-dealers is so generally a matter of common reputation that I, as a receiver of flour, would not like to classify the principal ones; I should tread on somebody's toes whose flour was left out.

C. Q. 169. Of course each one thinks the one he deals in is the principal one?

A. He is very apt to think that way.

JOHN C. SMITH, being duly sworn and examined as a witness on behalf of complainant, testifies as follows:

Q. 170. Give your name, age, residence and occupation.

A. John C. Smith; 50; Newark, New Jersey; jobber or wholesale dealer in flour and grain.

59 Q. 171. Within about what territorial limits do you make your sales?

A. Well, New Jersey covers most of our trade.

Q. 172. Have you handled the complainant's "Columbia" brand of flour?

A. Yes, sir.

Q. 173. For what period?

A. I think about four years.

Q. 174. Have you sold a considerable quantity of it in that period?

A. We think we have.

Q. 175. Is there a demand for it among your customers?

A. There is.

Q. 176. Did the defendants sell flour in the same territory in which you make your sales?

A. Some parts of it.

Q. 177. Have you any information as to their making sales of flour with the brand such as is admitted in their answer?

A. I have been told they sold it.

Q. 178. Have you seen the brand yourself which was alleged to have come from the defendants?

A. Yes, sir.

Q. 179. About how long ago did you first see it?

A. Last summer.

Q. 180. Did you have any knowledge of their selling flour of a brand containing the word "Columbia" previously?

A. No, sir.

Q. 181. Can you state whether or not the sales of flour by the defendants containing the brand which they admit has had any effect upon the sales by the complainant of its Columbia brand of flour in this community?

60 A. I believe it has, and it has caused considerable dissatisfaction about the brand.

Q. 182. Will you please explain what you mean by that statement?

A. I mean when we would make a price on Columbia to our customers, about the same time another flour would be offered under the same brand for considerable less money; by that the people would lose confidence in the flour and in the representations made about the flour.

Q. 183. Can you state whether or not, by reason of these complaints and this interference, you took less of the complainant's flour than you would otherwise have taken?

A. I can only answer that by saying that I am fully satisfied that we have; we have lost a number of sales of car lots.

Cross-examined by Mr. Alcorn:

C. Q. 184. Mr. Smith, you do a large business in Newark and its surroundings, do you not?

A. I don't know what you term a large business, Mr. Alcorn.

C. Q. 185. In the flour business you are a large dealer?

A. We do a considerable business.

C. Q. 186. Do Alcorn & Co. sell much flour in your locality?

A. Not to my knowledge, they don't.

C. Q. 187. Where did you see the brand of Alcorn & Co.?

A. In Newark.

C. Q. 188. Where in Newark?

A. I saw it at a baker's.

C. Q. 189. Can you name him?

A. I think I saw it at two bakers'.

61 C. Q. 190. Name them.

A. Adam Turkes, I think, is one, and Liebhauser.

C. Q. 191. Was Turkes a customer of yours?

A. He is, yes, sir.

C. Q. 192. Did he buy the "Columbia patent" brand from you of the Columbia Mill Company?

A. I think he has.

C. Q. 193. Can't you state positively whether he has or not, Mr. Smith?

A. I can't state positively now; no, sir.

C. Q. 194. Did Mr. Turkes say to you that, when he purchased this brand of Alcorn & Co., he thought it was the flour of the Columbia Mill Company, or that it was represented as the flour of the Columbia Mill Company?

A. My salesman says he did; not direct to me.

C. Q. 195. Then he did not say it to you?

A. Not direct to me; no, sir.

C. Q. 196. Was it you who saw it in Turkes' or your salesman?

A. My salesman says he saw it.

C. *R.* 197. You didn't see it?

A. I don't remember.

C. Q. 198. You saw it at the other baker's?

A. I did.

C. Q. 199. Did that other baker say it was represented to him as the flour of the Columbia Mill Company?

A. My recollection is that he did.

C. Q. 200. What did you say that baker's name was?

A. Liebhauser.

C. Q. 201. Where is his place in Newark?

A. Plain street, he was, but he is not there now.

C. Q. 202. You saw it there but once?

A. I think I saw it there several times.

62 C. Q. 203. Are there any of your other customers with whom you saw this brand?

A. I did not see it all myself.

C. Q. 204. I only want you to state what you saw?

A. I didn't see it all myself; the salesman reported to me. I saw this at Liebhauser's I know; I am not sure about Turkes, whether I saw it or not.

C. Q. 205. When was it you saw it at Liebhauser's.

A. Last summer. Mr. Carroll, I think, had it too. I am not sure but it was before that it came in; I am not sure but it was along last fall when we first saw it.

C. Q. 206. Did you see that?

A. I didn't see it at his place; I saw a brand from there.

C. Q. 207. Have you many customers who buy the "Columbia" flour from you who also purchase from Alcorn & Co.?

A. I don't know who purchased from Alcorn & Co.

C. Q. 208. Do I understand you to say, Mr. Smith, that recently you have purchased less of the Columbia Mill Company's flour "Columbia" brand than previously?

A. No, sir; I didn't say that; I don't think that was the question.

C. Q. 209. I understand you to say that, in consequence of the sale by Alcorn & Co. of the brand of "Columbia patent," that it caused you to purchase less of the Columbia flour from the Columbia Mill Company?

A. I said I was satisfied that we took less.

63 C. Q. 210. You say that it caused you the loss of the sale of some cars of flour? To whom would you have sold those cars?

A. I should think that was a hard question to answer.

C. Q. 211. There wasn't anybody in particular, then?

A. No; I don't answer it that way. The interference of the Alcorn brand may have prevented us from selling a great many cars, but I could not say how many.

C. Q. 212. And you don't know, Mr. Smith, of any actual case in which it did prevent you from selling any?

A. I didn't say so.

C. Q. 213. Do you know of any case where you were prevented from making a sale?

A. I know where we had it, as we considered, as good as sold, and then the Alcorn flour was offered at a much less price, and it caused a great deal of dissatisfaction, and, of course, we lost the sale.

C. Q. 214. To whom was that?

A. Well, to different parties.

C. Q. 215. Can't you state any one in particular?

A. Well, I will only say different parties.

C. Q. 216. You refuse to state any particular parties?

A. No; I refuse to give the names of my customers.

C. Q. 217. You have seen the brand of Alcorn & Company?

A. Yes, sir; what is termed their brand.

C. Q. 218. The brand now in dispute. You knew it was not the brand of the Columbia Mill Company, did you not?

64 A. I knew it was not an exact copy of that brand.

C. Q. 219. Looking at both of them, you knew that one was the Columbia Mill Company and the other was Alcorn & Co.

A. That is the black brand, not the black and blue; there was one black and blue brand.

C. Q. 220. Did you ever see the black or blue?

A. I didn't see that, no.

C. Q. 221. You say there was one black and one blue?

A. So my salesman said.

C. Q. 222. You never saw the brand red and blue?

A. Not myself; no, sir.

C. Q. 223. I understood you to say that the black brand you could distinguish easily from the brand of the Columbia Mill Company?

A. I could.

By Mr. GUNCKLE:

C. Q. 224. What is your opinion as to whether or not the brand that the defendants use might mislead incautious purchasers, such as small dealers and consumers buying in the ordinary way?

A. It wouldn't mislead me, but it might mislead those who were not familiar with the brands.

ROBERT A. WOOD, being duly sworn and examined as a witness on behalf of the complainant, testified as follows:

By Mr. GUNCKLE:

Q. 225. Where do you reside and what is your occupation?

A. Newark; salesman.

Q. 226. For whom are you salesman and of what?

A. J. C. Smith & Co.; flour and grain.

65 Q. 227. How long have you been in their employ?

A. Since the first of the year.

Q. 228. Have you sold any "Columbia" brand of flour for J. C. Smith & Co.?

A. I have.

Q. 229. In what territory?

A. New Jersey.

Q. 230. Do you know anything about defendants selling any flour branded "Columbia" in the places where you sell flour?

A. In a few cases; yes, sir.

Q. 231. Have you seen any so branded that you were informed came from these defendants?

A. I have.

Q. 232. Where did you see it?

A. In New Brunswick and in Plainfield.

Q. 233. At whose place in Plainfield?

A. A baker; his name is Lifke or Liefke.

Q. 234. And at whose place in New Brunswick?

A. Runyon's. I have also seen it in Trenton, but I can't state where; I don't remember.

Q. 235. What was the business of the Runyon in whose place you saw it in New Brunswick?

A. They are flour and grain and coal dealers.

Q. 236. Did you see one or more barrels of it in their place?

A. I saw quite a pile.

Q. 237. Did you see it in such a place as flour was kept which was being held for sale?

A. Yes, sir; I saw it in the store-room with other brands tiered up.

Q. 238. You were informed, you say, that it came from these defendants?

A. In one case.

66 Q. 239. What were the colors of the brands you saw in New Brunswick?

A. Red and blue.

Q. 240. In a like or different arrangement from the use of those colors in complainant's brand?

A. They were the same colors.

Q. 241. Was the arrangement of the colors the same?

A. The arrangement was exactly the same with the exception that in the Columbia Mill Company's brand the "Columbia" is in red and the "patent" is in blue, and in the other brand the red is "Columbia patent."

Q. 242. Both words?

A. Both words.

Q. 243. You have no knowledge, have you, of sales prior to this year?

A. I have not; no, sir.

Q. 244. Can you fix the time at which you saw this flour in New Brunswick?

A. It was in the summer some time; since last winter.

Cross-examined by Mr. ALCORN:

C. Q. 245. You are salesman for Mr. J. C. Smith, I understand?

A. Yes, sir.

C. Q. 246. Do you sell to Runyon & Co., of New Brunswick?

A. I do not.

C. Q. 247. Did you sell to the baker of which you speak in Plainfield?

A. I did.

C. Q. 248. How long since you sold him?

A. This summer.

67 C. Q. 249. When was it you saw the brand spoken of in his place?

A. Last summer.

C. Q. 250. Did he tell you that it was the Columbia Mill Company's flour, or represented to him as such?

A. He did not; no, sir.

By Mr. GUNCKLE:

C. Q. 251. Did any of these parties with whom you saw the defendants' brand state what flour it was?

A. Runyon, in New Brunswick, whom I saw frequently, with whom I talked Columbia frequently, told me on one of my visits that they had the genuine "Columbia" flour. I asked him where it came from. He told me it came from the Columbia Mill Company, of Minneapolis, and I personally saw the brand and thought it was the genuine from a hasty glance, because I knew that the other brand had been black prior to that time.

Objected to.

By Mr. ALCORN:

C. Q. 252. Do you know who branded that flour?

A. I do not.

C. Q. 253. Did it have the name of Columbia Mill Company on it?

A. It did not, but the general arrangement of the brand in blue and red was the same as the other, and I in passing the window mistook it for the same brand and reported it so.

C. Q. 254. You just now said that you knew it was not genuine?

A. I know that now.

C. Q. 255. I understood you to say that as you passed it you knew it was not genuine?

68 A. I beg your pardon; I said I mistook it for the genuine from a hasty glance.

C. Q. 256. Then, if you mistook it for the genuine, why do you say that it was not in black letters as it originally had been?

A. When I first saw this flour in Trenton——

C. Q. 257. What flour are you speaking of?

A. Alcorn's;—the brand was always black; when I saw it in New Brunswick, the brand had been changed to a red and blue brand, and I, knowing that the previous lots had a black brand, certainly mistook it for Columbia mill's goods, seeing the brand in red and blue. Then on my next visit to New Brunswick, I went into the store and saw it tiered up with a red and blue brand, and, of course, then I knew it was not the goods that I was selling.

C. Q. 258. Then, when you speak about it not being the genuine, you did not mean Alcorn's original brand?

A. I call my own the genuine.

C. Q. 259. I understood you to say that on a casual glance you thought that it was not the genuine, because that had been in black colors?

A. I thought it was not the genuine brand because on my former visit I mistook it for ours and reported it.

C. Q. 260. And you say on a subsequent visit you know it was not?

A. On my next visit I went in the store and saw it was simply Alcorn's flour.

C. Q. 261. How could you tell it was Alcorn's flour?

A. Because the lettering then was the same as Alcorn's flour had always been, only it was not a black brand.

69 It is agreed between counsel that this witness may sign the stenographer's minutes in lieu of signing the transcript, and that the same shall be regarded as sufficient signature, defendants' counsel reserving the right to object to the stenographer's transcript, if he does not think it conforms to the testimony as given.

On reading over the testimony to the witness he says: It was Liefke told me the flour came from Alcorn, and Runyon said it come from the Columbia Mill Company, but did not say it come from Alcorn; he didn't mention Alcorn's name; he said it was represented to him it came from the Columbia Mill Company.

(Signed) ROBERT A. WOOD.

Complainant's counsel requests an adjournment till 10 o'clock tomorrow morning.

Mr. Alcorn, it not being certain that the witnesses will be here tomorrow, says he will go to Philadelphia, and cannot be here tomorrow at 10 o'clock.

70 Circuit Court of the United States for the Eastern District of Pennsylvania. In Equity.

The Columbia Mill Company
vs.
William W. Alcorn and Samuel Alcorn, Trading as Wm. W. Alcorn & Co.

State of New Jersey, }
County of Essex, } *ss:*

Deposition of James Carrol, taken before me, A. B. C. Salmon, a notary public in and for the county and State aforesaid, by consent of parties, in an action pending in the United States circuit for the eastern district of Pennsylvania, wherein The Columbia Mill Company is complainant and William W. Alcorn *et al.* are defendants, in equity, on this 11th day of October, 1888, at the office of said James Carrol, No. 46 Market street, Newark, N. J., complainant being represented by its counsel, P. H. Gunckel, Esq., and defendants by their counsel, James Alcorn, Esq.

And thereupon the following proceedings were had:

71 JAMES CARROL, a witness of lawful age, being produced on behalf of the complainant, and being by me duly sworn to testify the truth, the whole truth and nothing but the truth, in answer to interrogatories proposed to him testified as follows:

Direct examination by Mr. GUNCKEL:

Q. 262. Please state your name. age, residence and occupation.

A. James Carrol; 56; Clinton township; flour and feed business, butter, eggs and cheese.

Q. 263. Where do you carry on business?

A. Forty-six Market street, Newark.

Q. 264. How long have you been in the flour business?

A. About thirty years, I guess; in the neighborhood of thirty years.

Q. 265. What is the character of the business?

A. Flour, feed, butter, eggs and cheese.

Q. 266. Are you acquainted with the defendants in this case?

A. Yes, sir.

Q. 267. Have you had dealings with them in connection with the purchase of flour?

A. Yes, sir; I got some flour of them.

Q. 268. Have you had any flour of them that was branded with the word "Columbia"?

A. Yes, sir.

Q. 269. Please state what the transactions were and when.

A. Some time since New Year's, I think it was, that I had that flour; I couldn't tell the exact date.

Q. 270. How much of it did you buy?

A. Three cars. I had one car I didn't accept.

Q. 271. Why did you not accept it?

A. Well, the second car I had some complaints from the
72 families; it didn't seem to suit for a family flour; but I didn't
have any complaint from the bakers' trade where I put it in; and I had then three parts of a car on hand, and I hadn't room to take in the other anyhow when it came in, and I notified Mr. Alcorn, and he sold it to somebody else. My place is small here; if I get flour that I can't run in to every trade it lasts too long; and I intended to put in another family flour and run this out.

Q. 272. You bought this flour of the defendants in car-load lots?

A. Yes, sir.

Q. 273. And you sold it to your customers in this community, did you?

A. Yes, sir; I didn't sell any of it outside of Newark.

Q. 274. Who are your customers; I mean, not what are their names, but what class?

A. Bakers, and families and grocers.

Q. 275. Do you sell any of it in less quantities than barrels?

A. No, sir.

Q. 276. You buy it all in barrels; none in sacks or bags?

A. No, sir; all in barrels.

Q. 277. The first car-load, I believe you said, proved satisfactory, and the second not so?

A. Well, at first I didn't give any of it out to families, only one barrel that I took to my own house, and I thought it baked a very nice loaf of bread and would suit my family trade; then the next car that come in I commenced to give it to families, and I had complaints and I stopped selling it to families.

Q. 278. In selling this flour to families and bakers what, if any, representations did you make as to what it was?

73 A. I represented it to be a first-class flour, sir, and as good a patent flour as they made; that is what I supposed it was.

Q. 279. Did you make any representations or explanations to your customers as to where the flour was made, or by whom it was made?

A. No, I didn't know where it was made or who made it; all I know about it was, Mr. Alcorn told me it was their mills beyond Minneapolis where it was made; I didn't ask him where, or who made it; I didn't know the miller's name; I hadn't any dealings with the miller; all with Alcorn.

Q. 280. Did you know where this flour came from?

A. No, sir.

Q. 281. Did Mr. Alcorn tell you where it came from?

A. Only as I said; it was 300 or 400 miles beyond Minneapolis that it was made; that is what he told me; he didn't tell me the name of the place or anything further about it; I didn't ask him; all I wanted to know, it was good; I am buying flour for several agents all the time and I never asked them who makes the flour; they consign the flour to themselves and give me an order to get it here when it arrives on the track.

Q. 282. In selling flour here to families, as you say, how do you sell it, by sample or in what way?

A. No; there was none of it bored; it come from the mill, but no holes bored, and I don't believe we bored a barrel of it; sold it for good family flour.

Q. 283. By what name did you sell it?

A. They didn't ask me the name or the name that was on the barrel; I showed them the barrel there; they could see the name themselves.

74 Q. 284. Was it sold to customers who came into your store and saw the packages of flour, or in what manner?

A. It was sold, as I told you, for to be a good flour, and if not I would exchange and give another barrel. The customers came to the store for flour; I have no drummer at all drumming for me, sir. These private families, the man or the woman, the lady or husband, generally comes here and orders a good barrel of flour; they very seldom look at the flour, they leave it to me; I have been here long in business; they trust to me; and several of those families have been getting flour of me perhaps 20-odd years, and they know if the flour doesn't suit them their money is ready for them here, or another barrel; if that don't suit them we give them another barrel or return the money.

Q. 285. Then, if I understand you right, you sold this flour to your customers simply by the name it bore, as being a good patent flour?

A. Half of them didn't know what name it was. They didn't ask me the name; half of them trusted me to give them a good barrel of flour, no matter what name was on it. Some parties looked at the flour, and some didn't; they trusted to me; come in here and tell me they wanted a good barrel of flour, and they paid for it, and they didn't know what they were getting until they seen it in the house.

Q. 286. How did you sell it to bakers?

A. I drew a sample for the bakers. There is only one baker, I think, that had any amount of that. I think I sold 50 barrels to one baker of it as a first-class patent flour, and I think I drew a sample of it and showed him a sample. I think I bored one barrel of that for a sample for him; he never complained of it at all.

75 Q. 287. These barrels of flour that you bought from Alcorn, as you say, bore a brand containing the words "high grade, No. 1 hard wheat, Columbia patent, Minneapolis, Minn."

A. I don't think "Minneapolis" was on it to the best of my knowledge; I couldn't say positively; I wouldn't want to say that it was; it was a black brand and marked "Columbia patent," I think. I couldn't say exactly what brand was on it, for I never paid much attention to it. The flour I get from them now was by another brand; I didn't have any of the same brand since; whether it is the same flour or not, I don't know; they told me it was the same flour.

Q. 288. For the purpose of refreshing your recollection, I show you a coyy of the affidavit you made in this case, and ask you to read it, and see whether your recollection is any more distinct as to what the brand was.

A. I don't remember now whether "Minneapolis" was on the brand; I suppose that is right if it is in the affidavit.

Q. 289. At the time the affidavit was read to you, one of the defendants, Mr. Samuel Alcorn, was present, was he not, and did not we compare the wording of the brand as given in the affidavit, with that shown on the barrels in your store, and was it not correct, as you knew at the time?

A. There was some alterations that you had to make; I don't know what that was. I know Mr. Alcorn was here, but he was not here when I signed it.

Q. 290. I hand you a paper, which I desire the notary to identify as "original draft Carroll's affidavit," and ask you whether or not you recollect that this was read to you in the presence of
76 Mr. Samuel Alcorn, and that the corrections noted in pencil
therein were made at his suggestion upon comparison with the brands on the barrel in your store?

A. Yes, sir. Mr. Alcorn was here, and you and him went down and looked at the barrels, and you said you would make the corrections and draw a new one, and did draw a new one, and the next day you came here with the affidavit. I asked Mr. Alcorn if that was correct, and then you both went back there and made it correct, as far as I know.

Counsel for complainant offers in evidence said original draft. Objected to.

Cross-examination by Mr. Alcorn:

C. Q. 291. The brand of which you speak was "Columbia patent," was it not?

A. Yes, sir.

C. Q. 292. It was so billed to you, as "Columbia patent," was it?

A. Yes, sir.

C. Q. 293. Not merely "Columbia" but the words "Columbia patent" as the brand?

A. Yes, sir.

C. Q. 294. And when it was sold to you was it represented as the flour of the Columbia Mill Company?

A. No, sir.

C. Q. 295. You bought it on sample?

A. Yes, sir.

C. Q. 296. And you sold it to the bakers on sample?

A. Yes, sir.

C. Q. 297. Did any of the families who called to get flour from you ask for Columbia flour?

A. No, sir; they didn't know I had it.

77 C. Q. 298. And you didn't sell this flour to any families or any baker because it was branded "Columbia patent" or any other brand of "Columbia"?

A. I didn't know there was such a mill in existence; it was the first time I ever heard of the brand.

C. Q. 299. Did you ever buy any flour of the Columbia Mill Co.?

A. No, sir; I never seen a barrel of their flour in this city.

C. Q. 300. And you never sold the flour as being the flour of the Columbia Mill Company?

A. I didn't know they were in existence, sir.

C. Q. 301. I understood you to say you had received the same flour under a different brand?

A. Yes, sir.

C. Q. 302. And it had proved satisfactory?

A. Every barrel of it.

C. Q. 303. To families?

A. I have sold some to families; I have had no complaints, sir.

C. Q. 304. In your dealings with flour merchants it is not an unusual thing to have the same grade or quality of flour at one time not so good as another?

A. Sometimes it varies.

C. Q. 305. Alcorn & Co. have taken back all that flour which you didn't dispose of?

A. Every barrel of it, sir; they send me other flour in the place of it.

C. Q. 306. Do you know whether the flour sent in the place of it was the same make of flour?

A. I couldn't say; it was not the same brand.

C. Q. 307. Do you know what brand it was?

A. I couldn't tell, sir; it was a different brand altogether.

C. Q. 308. Was it "Diamond X" or "Saratoga"?

78 A. It was "Invincible" or some such brand.

C. Q. 309. But was it a patent flour?

A. The brand was "Imperial."

C. Q. 310. You don't remember whether they told you it was the same flour or not?

A. No, sir; I never asked them; I told them to send me good flour in the place of it; first-class flour that I could sell, and they done so.

C. Q. 311. Do you know the bakers of Plainfield?

A. No, sir; very seldom I get out of here; I have to stay here and mind the ranch.

C. Q. 312. Did you know a man named A. J. Liebhauser?

A. Yes, sir.

C. Q. 313. Where is he?

A. He was in Plain street at that time, in Newark; he is in Bowery street now.

C. Q. 314. Is he still alive?

A. Yes, sir; unless he died since yesterday; I seen him yesterday.

C. Q. 315. Did you sell him some of this flour?

A. Yes, sir.

C. Q. 316. You sold him the first "Columbia patent"?

A. Yes, sir; he had fifty barrels out of the car; we sell to bakers and draw it from the car.

C. Q. 317. He is the baker you spoke of as having sold fifty barrels?

A. Yes, sir.

C. Q. 318. Was it ever represented to him as the flour of the Columbia Mill Company?

A. No, sir.

C. Q. 319. Do you remember Mr. Gunckel, the attorney for the complainant, saying to you when he desired you to make affidavit, that Alcorn picked this flour up wherever he could get it and branded it?

79 A. He picked up the flour and branded it to suit himself; whether it was this one or not, I don't know.

C. Q. 320. He desired you, then, to make an affidavit that it had been represented to you as the Columbia Mill Company's flour?

A. He desired me to make an affidavit; he didn't say to me that it was represented that, because I told him previous to that, it was not; he couldn't say that, because he knew better.

C. Q. 321. And you still deal with Alcorn & Co.?

A. Yes, sir.

C. Q. 322. Taking flour from them yet?

A. Yes, sir; I am owing them $1,200 or $1,500 now; I got flour in from them last week that I bought last June.

C. Q. 323. Did you ever buy any flour from Grenville Perrin & Co., of New York?

A. Not that I know of.

C. Q. 324. Or J. C. Smith, here in Newark?

A. Some little things; run short some straw; but no flour of anybody in Newark.

C. Q. 325. What is Mr. Smith's business, particularly?

A. He is in the flour business; grain and all kinds of hay and straw and feed.

C. Q. 326. He is a member of the New York produce exchange?

A. I believe he is now; he was cut off here some time ago for branding flour himself.

C. Q. 327. Do you know what brand he put on the flour?

Objected to.

A. I couldn't say; he was tried before the committee of the produce exchange and his seat was taken away from him, but
80 after three or six months he got them to reconsider it and he
was allowed to retain his seat again.

C. Q. 328. Do you know whether he put somebody else's name on?

A. Some mill brought this charge against him; I couldn't say what mill it was.

Redirect examination:

Q. 329. Did I ask you to make any statements in your affidavits that were not correct?

A. I don't think you did, sir; for it wouldn't be of any use for you, for I wouldn't do it.

Q. 330. Did I request you to do anything more than make an affidavit of the facts?

A. No, sir; and I voluntarily done it for you.

Q. 331. You got two car-loads of this flour; how many barrels would that be?

A. I think there was 150 in each car.

Q. 332. How much of that flour did you return to the Alcorns?

A. I couldn't say positively now; I think 58 barrels, or something along there; all I had of it in the store here at the time.

Q. 333. The rest of it was sold to bakers and other consumers?

A. Yes, sir; the rest was disposed of.

JAMES CARROL.

Sworn and subscribed to before me this 11th day of October, A. D. 1888, at Newark, N. J.

A. B. C. SALMON,
Notary Public.

81 STATE OF NEW JERSEY, }
County of Essex, } *ss:*

I, A. B. C. Salmon, a notary public in and for the county and State aforesaid, being duly commissioned and qualified under the laws of the United States to take depositions for use in the circuit courts of the United States, do hereby certify that the foregoing deposition of James Carrol was taken before me at the office of said Carrol, No. 46 Market street, Newark, N. J., on the 11th day of October, 1888, by agreement of counsel for complainant and respondents in the case named in the caption hereof; and further certify that during the taking of the testimony counsel for both parties attended; and I further certify that the said James Carrol was by me carefully sworn to tell the truth, the whole truth and nothing but the truth; and that the deposition was reduced to writing by me stenographically in the presence of the witness, and from his statements and after being transcribed and carefully reading the same, the witness subscribed the same in my presence; that I have retained the said deposition in my possession for the purpose of sealing up and transmitting the same by mail, together with this certificate to the court for which the same was taken. And I do further certify that I am not of counsel nor attorney for either of said parties in said deposition in the caption named or in anywise interested in the event of said cause named in said caption.

In testimony whereof, I have hereunto set my hand and affixed my official seal, this 13th day of October, A. D. 1888.

A. B. C. SALMON,
Notary Public.

[NOTARIAL SEAL.]

82 Circuit Court of the United States for the Eastern District of Pennsylvania.

THE COLUMBIA MILL COMPANY }
vs. } In Equity.
WILLIAM W. ALCORN *et al.* }

STATE OF NEW JERSEY, }
Middlesex County, } *ss:*

Deposition of Peter P. Runyon on behalf of complainant in the above cause, taken before me, George Berdine, a notary public for said county and State, at the office of James H. Van Cleef, Esq., in New Brunswick, N. J., on the 11th day of October, A. D. 1888, by consent of parties, the complainant being represented by P. H. Gunckel, Esq., and the defendants by James Alcorn, Esq.

PETER P. RUNYON, of the city of New Brunswick, New Jersey, a witness produced on the part of the complainant, being duly sworn, assumes and says:

Q. 334. Please state your name, age and occupation.

A. Peter P. Runyon; forty-two years of age; residence, New

Brunswick, New Jersey; merchant, of the firm of P. P. and D. F. R. Runyon, flour and feed dealers, of New Brunswick, New Jersey.

Q. 335. Are you acquainted with the defendants and have you had dealings in flour with them?

A. Yes, sir.

83 Q. 336. Has your firm bought from the defendants any flour with the brand containing the word "Columbia"?

A. They have.

Q. 337. How much of such flour and when was the same bought?

A. We bought between five and six hundred barrels; I think the first purchase was within the past six months; we have made several purchases.

Q. 338. This flour was delivered at two or more different time within the period you speak of, was it not?

A. It was.

Q. 339. Can you state what the wording of the brand was?

A. Not exactly, but I know the word "Columbia" was a part of the brand, but I can't tell exactly the entire wording of that brand. I suppose the brand of the flour was known as the "Columbia patent," but don't know as to that. It is difficult to know just what a miller means his brand to be by the mark on the barrel; as a rule they generally take one word, as I understand it, this way on the head of the barrel.

Q. 340. Have you any of this flour in stock at present in your store?

A. We have.

Q. 341. How long since you purchased it?

A. I think it was about two months ago we purchased it; we have it on hand about four weeks; this particular car, I mean.

Q. 342. When and to what class of purchasers have you sold the flour bought from the defendants which was branded with the brand "Columbia"?

A. Within a radius of twenty miles of New Brunswick, to bakers, grocers, and consumers.

84 Q. 343. Have you sold any of it in less quantities than by the barrel?

A. We have.

Q. 344. In what sort of packages was it done up and how marked or branded?

A. This flour, when sales were made in quantities less than a barrel, was put up in ninety-eight and twenty-four and a half pound muslin sacks, branded "Superlative," bags turned inside out so as to cover up the name; the reason of this was, we had on hand sacks branded "Superlative," and we use them as convenience only; none of these sacks were branded "Columbia."

Q. 345. How did you designate this flour when you sold it in small quantities?

A. "Minnesota patent."

Q. 346. What were the colors used in the brand that contained the word "Columbia" when you got the flour from the defendants?

A. Some of the flour the brand was in solid black, others in two colors; the exact colors I don't remember.

Q. 347. In what color was the word "Columbia" in those of two colors?

A. I can't tell you that positively.

Q. 348. What is your best recollection of what those two colors were, or either of them?

A. I think the word "Columbia patent" was in red and the rest of the mark was in blue; that is my best recollection of it. We have no barrels or any of that brand on hand now.

Q. 349. Can you state approximately when you got the flour that was branded in the two colors, as you have testified?

A. I think about two months ago.

85 Q. 350. In what manner was this flour sold to you—by sample, by brand or by name?

A. I know it was bought by sample; I very rarely purchase flour without ascertaining what brand is on the barrel. This I put stress upon, and in answer to my question Mr. Alcorn said, I think (I cannot say positively) "Columbia patent" made in Minnesota.

Q. 351. Did Mr. Alcorn state where this flour was made?

A. I think not.

Q. 352. When you bought it what was your understanding as to its place of origin?

A. Minnesota.

Cross-examination by JAMES ALCORN, Esq., counsel for the defendants:

C. Q. 353. Did you ever buy any flour from the Columbia Mill Company?

A. I don't think so.

C. Q. 354. Did you ever have any flour with the brand "Columbia" except that from Alcorn & Co.?

A. I think not.

C. Q. 355. Did you ever buy any flour of J. C. Smith, of Newark, N. J., or Grenville Perrin & Co., of New York?

A. No, sir.

C. Q. 356. Was this flour ever represented to you by Alcorn & Co., as being made by the Columbia Mill Company?

A. No, sir.

C. Q. 357. Did you ever state to any customers of yours that it was made by the Columbia Mill Company?

A. No, sir.

86 C. Q. 358. Did you ever state to Mr. Wood, the salesman of J. C. Smith, that this flour was represented to you as made by the Columbia Mill Company?

A. No, sir.

C. Q. 359. Did any of the consumers to whom you sold, receive this flour upon their request for "Columbia"?

A. I could not say about that.

C. Q. 360. Mr. Runyon, do you sell any flour by sample?

A. Yes.

C. Q. 361. Did you sell this flour by sample?

A. Yes, I sold some of it by sample. By sample I mean I send a whole barrel or more to try it; this is what I mean by sample. The first man got five barrels.

C. Q. 362. In the introduction of it you did not sell it by its name, did you?

A. No, sir; that refers to the first sale; that only refers to the introduction of the flour.

C. Q. 363. Did you request the brand to be put in color?

A. I think I did; the first lot of flour I got was branded in solid black; I then asked them, can't you give me a little better color than that? I told him I wanted the brand brightened up a little.

C. Q. 364. Did you request the colors for the purpose of imitating any other brand?

A. No, I had not the least idea of what they were going to put in. I only said, brighten it up a little from the solid black.

C. Q. 365. Have you purchased the same flour since under another brand?

A. Yes; under the brand "Saratoga."

87 Redirect by Mr. GUNCKEL:

R. Q. 366. You speak of introducing this flour by sample; how was it afterwards sold?

A. "Send me some more of the same kind," would be the way some would order it for the second time. Others might say, "Send us up some more of that 'Columbia' like I had before."

R. Q. 368. You yourself visit the purchasers, do you not?

A. Yes, the ones that purchase from our firm.

R. Q. 369. In what manner did you usually offer this flour to your purchasers?

A. I cannot recall of but one instance of a baker purchasing this flour by itself. Ordinarily, in soliciting orders from bakers, I solicit an order for a mixture of flour, the baker not knowing the brands to be put in that mixture. If he is suited with the mixture, the next order he will say, "Give me some of the same kind I had before." That is what I mean to say.

R. Q. 370. Your last answer has reference to your customers who are bakers?

A. Yes, sir; I don't recall any instance where this flour went into the hand of grocers.

(In explanation of the witness's answer to the 9th interrogatory, the witness desires to state, "that our firm's usual business is with bakers, grocers and consumers, but my recollection is now that we did not sell any of this particular brand of flour to grocers.

(Signed) P. P. RUNYON.

88 STATE OF NEW JERSEY, } ss:
Middlesex County, }

I, George Berdine, a notary public for said county and State, being duly commissioned and qualified to take depositions for use in the circuit courts of the United States, do hereby certify that the foregoing deposition of Peter P. Runyon, was taken before me at the office of James H. Van Cleef, Esq., of the city of New Brunswick, New Jersey, on the 11th day of October, A. D. 1888, by agreement of counsel for both parties named in the caption hereto; and I further certify that during the taking of the testimony counsel for both parties were present as appears; and I certify that the said Peter P. Runyon was by me carefully examined and sworn to testify the truth, the whole truth and nothing but the truth; and that the deposition was reduced to writing by me in the presence of witness and from his statement, and that after carefully reading the same to witness he subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of sealing up and mailing the same with this certificate to the court for which the same was taken. And I do further certify that I am not of counsel nor attorney for either of said parties in said caption named or in any way interested in the event of the cause in said caption named.

In testimony whereof, I have hereunto set my hand and affixed my official seal, this 11th day of October, A. D. 1888.

GEORGE BERDINE,
[NOTARIAL SEAL.] *Notary Public, New Jersey.*

89 Circuit Court of the United States for the Eastern District of Pennsylvania.

THE COLUMBIA MILL COMPANY
vs. } In Equity.
WILLIAM W. ALCORN *et al.*

STATE OF DELAWARE,
County of New Castle, } *ss:*

Depositions of sundry witnesses on behalf of complainant in the above cause, taken before me, George W. Bright, a notary public in and for the county and State aforesaid, at No. 826 Market street, at the office of Charles G. Guyer, in the city of Wilmington, Delaware, by consent of parties, the complainant being represented by P. H. Gunckel, Esq., its counsel, and the defendant- by James Alcorn, Esq., their counsel; and thereupon

WESLEY L. GILBERT, produced as a witness on behalf of the complainant, being duly sworn deposes and says, in answer to interrogatories proposed by counsel for complainant as follows:

Q. 371. Please state your name, age, residence and occupation.

A. Wesley L. Gilbert; age, twenty-five years; residence, 10th and Pine streets, Wilmington, Delaware; occupation, baker.

90 Q. 372. You are doing business and have been doing business as baker in the city of Wilmington, Delaware, have you not?

A. Yes, sir.

Q. 373. Do you know the defendants, William W. Alcorn & Company?

A. Yes, sir.

Q. 374. Have you had any dealings with them in flour?

A. Yes, sir.

Q. 375. Have you had from them any flour branded with a brand containing as a part thereof the word "Columbia"?

A. Yes, sir.

Q. 376. How much such flour have you had from them and within what period?

A. How much?

Q. 377. Yes, sir; how much?

A. Well, I don't remember how much altogether; but I bought considerable at a time—fifty barrels at a time—I suppose I have had a couple hundred of barrels, maybe more.

Q. 378. When did you buy the first of them so branded?

A. I bought the first of it last year some time, I don't remember when.

Q. 379. Was any representation made to you by them as to where this flour was made?

A. No, sir.

Q. 380. Did you know where it came from?

A. I knew it came from William W. Alcorn & Company, that is all I know where it came from.

Q. 381. Have you had any flour of the complainant, The Columbia Mill Company, or flour of their manfacture?

A. Yes, sir; I have.

Q. 382. Was it of their brand "Columbia"?

91 A. Was it the same?

Q. 383. Have you had Columbia Mill Company's brand of flour?

A. Yes, sir.

Q. 384. When you bought the first flour of the defendant that was branded with the word "Columbia," what make of flour did you understand it to be?

A. Well, I thought at first when they said "Columbia," it was the real "Columbia."

Q. 385. When did you learn that it was not?

A. As soon as I seen it; as soon as I seen the letters on it.

Q. 386. How was it branded, if you remember?

A. By different colors; the only difference I seen.

Q. 387. You are still a customer of both the complainant and defendants, buying flour branded "Columbia" from each?

A. Yes, sir.

Cross-examination:

C. Q. 388. Mr. Gilbert, from whom did you first purchase, from the Columbia Mill Company or from Alcorn & Company?

A. I first purchased from Mr. Alcorn, I believe.

C. Q. 389. The flour purchased from Mr. William Alcorn & Company and branded "Columbia patent," was it bought from them before you bought any from the Columbia Mill Company branded "Columbia"?

A. I think it was, yes, sir.

C. Q. 390. Was it represented by William W. Alcorn & Company their Columbia patent as the flour of the Columbia Mill Company?

A. No, sir.

C. Q. 391. You know that it is not the flour of the Columbia Mill Company?

2 A. I do.

C. Q. 392. And since knowing that it was not the flour of the Columbia Mill Company, you still purchase it?

A. Yes, sir.

C. Q. 393. When you say it was in different colors, do you mean that the brand of William W. Alcorn & Company was in different colors than that of the Columbia Mill Company?

A. The letters marked Columbia was in a different color.

C. Q. 394. Was the brand of William W. Alcorn & Company all in black?

A. I think it was, yes, sir.

C. Q. 395. They never told you where it was made, did they?

A. No, sir.

C. Q. 396. And you did not care?

A. I never asked anything about it; I was very well satisfied with it.

C. Q. 397. And you did not care where it was made?

A. I did not care where it was made.

C. Q. 398. You haven't recently purchased any flour from them branded "Columbia," have you, from the defendants?

A. The real "Columbia"?

C. Q. 399. You have not purchased from William W. Alcorn & Co. any flour recently branded "Columbia patent"?

A. No, sir.

C. Q. 400. Under what brand do you get it now?

A. Now?

C. Q. 401. Yes.

A. Saratoga.

C. Q. 402. Same flour?

93 A. Yes, sir.

C. Q. 403. And when you first purchased the flour under what brand did you buy it?

A. "J. R. P."

C. Q. 404. When you bought it under the brand of "Columbia patent" didn't you know that it was the same that you purchased under the brand of "J. R. P."?

A. Well, I did not at first—I might know by the grade of flour if I had paid much attention to it, but I did not at first.

C. Q. 405. You tried the flour, didn't you, before you bought it?

A. Yes, sir.

C. Q. 406. You were not induced to buy it by the brand, were you?

A. No, sir; I was not.

C. Q. 407. And the flour which you bought you used yourself in baking?

A. Yes, sir.

C. Q. 408. You don't sell the flour, do you?

A. No, sir.

C. Q. 409. The complainants, by their agent and attorney some time ago, desired you to make an affidavit in the matter, did they not, in this proceeding?

A. I believe they did, yes, sir.

C. Q. 410. Did you ever refuse to make for Mr. Delaney an affidavit because of your relations with the defendants?

A. I did, yes, sir.

C. Q. 411. But you never stated to anybody that the defendants, William W. Alcorn & Company, ever represented this flour to you as the Columbia Mill Company's flour?

A. No, sir.

94 C. Q. 412. And the fact is they never did, did they?

A. No, sir.

(It is agreed between counsel that the witness may sign the stenographic notes in lieu of the long-hand copy, with the same force and effect as if he had signed the long-hand copy itself.)

WESLEY L. GILBERT.

John George Staib, a witness produced on behalf of complainant, being duly sworn deposes and says, in answer to interrogatories proposed by counsel for complainant, as follows:

Q. 413. Where do you reside and what is your business?

A. I reside at 314 Market street; business, baker; in Wilmington, Delaware.

Q. 414. Do you know the defendants in this case, Alcorn & Company?

A. Yes, sir.

Q. 415. Have you had dealings with them in flour?

A. Yes, sir; ever since I started up again this last time—since I came back from the country—I was in this town once before.

Q. 416. Have you bought any flour from them that was branded with the brand containing the word "Columbia"?

A. Yes, sir.

Q. 417. When did you buy the first from them?

A. I think it was in May—April or May of 1887.

Q. 418. How much have you bought from them altogether that was branded in that way?

A. I could not tell you that.

Q. 419. Can you give any idea?

95 A. Not at present, indeed I could not—several hundred, I guess.

Q. 420. When you bought the flour from them that was branded as "Columbia," were any representations made to you as to where it was made?

A. No, sir; same as the "Columbia" flour, that is all I know; I didn't know there was any difference; I did not know any difference; the brand of the flour was a good brand, and he just named such and such a flour, and at such a price.

Q. 421. When you bought the first time, what flour did you suppose it was—what make of flour?

A. I never could tell you that up to this day; I looked over the brand; I did not work myself at nights; all I did was to look over it and saw it was "Columbia;" that is all I looked at—the Columbia name.

Q. 422. You also buy flour of the Columbia Mill Company's manufacture, do you not?

A. Yes, sir.

Q. 423. Through Linnard & Gibbs, of Philadelphia?

A. Yes, sir; on and off.

Q. 424. Have you had any of this flour from the defendants recently?

A. Yes.

Q. 425. How recently?

A. I guess I have got it now,—got some now.

Q. 426. Has there not been some little difficulty with the delivery of flour from both complainant and defendants growing out of the fact that both were known as "Columbia" and both being received at the same depot?

A. Well, since that last time you were down, is all I know about
it; I never found it different; I never knew the difference;
96 it was only different in the color, one is upon the red and the
other is upon the black, that is all I know.

Q. 427. You say that is all the difference?

A. That is all I ever found, I never had any complaints; I buy both right along; I buy of Mr. Alcorn and of Linnard & Gibbs—same brands.

Q. 428. You recently purchased some flour of Linnerd & Gibbs as of the "Columbia" brand, and there has been some question between you and them as to whether it was delivered; can you explain how the matter stands?

Question objected to as leading.

A. In regard to this last lot, I sent down the driver to get these twenty-five barrels of that, and I told him to haul up thirteen—that is one lot 12 and the other lot 13—and he hauled up one load of twelve and went down after the rest, and the man said it was not there and said I had received it, but I didn't get it.

Q. 429. Do you know whether or not there is a like amount of the defendants' flour lying in the freight-house?

A. There is a lot there, but I could not tell whether it belongs to me or somebody else, I could not tell you that.

Cross-examination:

C. Q. 430. Mr. Staib, the flour which you purchased from Alcorn & Company, was branded "Columbia patent," wasn't it?

A. I could not swear to it because I never knew whether it was "Columbia" or "Columbia patent."

C. Q. 431. You were never working when in the bake-house?

A. No, sir; I never worked any. I never heard any complaints.

97 C. Q. 432. You bought the flour first from Alcorn & Company?

A. Yes, sir.

C. Q. 433. Bought from Linnard & Gibbs, did you?

A. Yes, sir.

C. Q. 434. And you bought this same brand of flour first from Alcorn & Company, didn't you?

A. Same brand; yes, sir.

C. Q. 435. And you tried the flour and found it was good, I understood you to say?

A. Yes, sir.

C. Q. 436. Did Alcorn & Company ever represent to you that this flour which he sold you was made by the Columbia Mill Company?

A. I could not tell you that, whether he did or did not.

C. Q. 437. You could not tell whether he did or not?

A. No, sir.

C. Q. 438. Did you—(interrupted by the witness)

I always asked for a good flour; willing to pay the price; he always told me, "I will recommend you this as good flour,—it will suit you; if not, send it back." I have never sent any back yet. I still buy of both.

C. Q. 439. If the flour did not suit you, of course you would not buy it merely by the name that was on it, would you?

A. No, sir.

C. Q. 440. And the flour which you bought you used in your bakery; you did not sell it?

A. No, sir.

C. Q. 441. You made an affidavit in which you said that Alcorn & Company never represented this as the Columbia mill
98 flour, and that you never bought it supposing it to be the Columbia mill flour; was that affidavit correct?

A. Indeed, I could not tell.

C. Q. 442. The complainants induced you to make an affidavit, didn't they, some time ago,—Mr. Delaney?

A. Yes, sir.

C. Q. 443. And you made an affidavit stating that it was not correct; is that so?

Objected to as not the proper mode of proving the contents of the affidavit.

A. After he came around, he got me all excited and I did not know which was right.

C. Q. 444. Do you mean Mr. Delaney got you excited?

A. Mr. Delaney and this gentleman, Mr. Gunckel.

C. Q. 445. Where did you sign the affidavit for Mr. Delaney and Mr. Gunckel?

A. In my store, at my counter.

C. Q. 446. You are certain you did not go out with them to sign it?

A. No, sir.

C. Q. 447. Certain of that?

A. Yes, sir.

C. Q. 448. Can't I recall your recollection about that, that you ent out from the store; after they returned the second time, didn't ou go out with them?

A. I went out with them.

C. Q. 449. Where did you go?

A. We went around to the hotel.

C. Q. 450. Around to the beer saloon?

A. Yes, sir.

C. Q. 451. And you had something to drink there?

99 A. Had something to smoke and something to drink.

C. Q. 452. And after that you signed their affidavit, is that not so?

A. Yes, sir.

C. Q. 453. And you say, at the time you were excited about it, you did not know which was right?

A. Yes, sir.

C. Q. 454. What did the people at the railroad depot say about you having an order for the flour which is there?

A. After I had sent a man down there for the balance, the next load, they told the man that there was not any more there, I had got it all, but I never did; they wanted the driver to sign the paper and the driver knew better and he would not until I got the barrels of flour. He came up and told me about it and so I went down myself a few days afterwards, and asked one of the clerks, and they thought I had got it, and he said, "Well go around and look at it yourself, and ask the man at the little office," and so they told me to go home and get the order for that flour, or else they could not give it to me.

C. Q. 455. You had no order for it had you?

A. No, sir; he got the first without an order.

C. Q. Was it not the flour you are now hauling and branded "Columbia patent" sold by Alcorn & Company to you, sold to you some time ago?

A. Which one?

C. Q. 456. The one you hauled in recently; when was it sold to you?

A. That was sold before the mill sent it.

C. Q. 457. When was that sold to you?

A. Six weeks or two months ago.

C. Q. 458. You are just now receiving it?

A. Yes, sir.

100 C. Q. 459. You are buying the same flour from them now, are you not?

A. Yes, sir.

C. Q. 460. Under what brand; what is the name under which you buy it now?

A. "Columbia."

C. Q. 461. But the last one—what was the last one; didn't you buy under the name of "Saratoga"?

A. This here flour?

C. Q. 462. Yes, the one you have not received yet, but the las you bought?

A. Yes, sir.

C. Q. 463. That is the same flour, isn't it; at least it has been represented as the same flour?

A. I got a bill last week after it arrived and the name said "Saratoga;" that is all I know about it.

Redirect examination:

R. Q. 464. Mr. Staib, I show you what purports to be a copy of an affidavit made by you in this cause, and ask you to read the same and state whether or not its contents are true.

(Hands witness affidavit.)

Objected to as the one shown is a copy, and not the original.

A. As much as I understand, it is correct—I bought flour just the same as "Columbia;" as regards the brand I never looked—I never knew—saw it was branded red or black.

R. Q. 465. Will you please hand that paper to the notary public to be made a part of your deposition and marked "Complainant's Exhibit Staib Affidavit"?

A. Yes, sir.

(Paper Exhibit Staib Affidavit handed to notary and marked.)

101 Recross-examination:

C. Q. 466. Mr. Staib, I understand you to say that you purchased the "Columbia patent" from Alcorn & Company before you did from Linnard & Gibbs?

A. Yes, sir.

C. Q. 467. And do we understand you to say, that you of your own free will desire to make this affidavit a portion of your testimony?

A. As much as I can understand about it; it may be different, but I cannot make out any better.

C. Q. 468. Witness is handed the original affidavit made by him and he is asked whether that is correct?

A. As much as I can understand it.

C. Q. 469. I desire you to attach this to the testimony as part of your testimony in this cause and hand it to the notary as you did in the previous case.

A. Yes, sir.

(Paper handed to notary, and marked "Staib's original affidavit.")

C. Q. 470. This flour which you obtained from Alcorn & Company is as good as any spring-wheat flour you get?

A. Yes, sir. I have been using more of that than any other. I may have answered him wrong when I meant right, but I never found any fault with either one.

Redirect examination:

R. Q. 471. When you signed the affidavit for Mr. Delaney and yself it was read over to you, and the matter had been talked over fore the affidavit was written out; is that not the fact?

A. Yes, sir.

102 R. Q. 472. And it was written out from your statements, giving the substance of what you said; did you or did you not understand that affidavit at the time it was read to you and you signed it?

A. Yes, sir; I believe I did—everything came on in a hurry—I was attending to the store and I was busy, and you folks came along there two or three times, and I kind of got a little on the wrong track.

R. Q. 473. How did you happen to sign the affidavit for Mr. Alcorn; what were the circumstances?

A. They came down and hunted me up, and told me about the same thing—to the best of my knowledge I do not think I told them any different.

R. Q. 474. You say in this affidavit that you made last, that you were not deceived. Will you explain what you meant by that, whether you understood what the flour was when you first bought it, or whether you merely meant to say that no misrepresentations were made to you?

(Objected to as leading.)

A. Well, I was not deceived as much as I could understand; I think I got the goods as they were represented to me as much as I could understand the word "deceived."

R. Q. 475. And what goods did you suppose you were getting?

A. Just the brand "Columbia."

Recross-examination:

C. Q. 476. When Mr. Delaney and Mr. Gunckel called on you, they had been up to your place several times after you to sign the affidavit, hadn't they?

A. Yes, sir.

C. Q. 477. Had you refused in the first place to make any affidavit?

A. I think I told them I had not time. They told me they 103 would be around maybe next week—it was on Saturday evening and they came back again and told me it would not take long.

C. Q. 478. They were with you for quite awhile, were they not?
A. Once or twice.
C. Q. 479. And they left to make a train?
A. Yes, sir.
C. Q. 480. And they came back again saying they had lost the train?
A. Yes, sir.
C. Q. 481. And then it was you made and signed the affidavit, after they came back?
A. Yes, sir.
C. Q. 482. The affidavit which you made for Mr. Alcorn, it wa read over to you, wasn't it?
A. Yes, sir.
C. Q. 483. And you knew what was in it at the time you signed it—understood it?
A. Yes, sir. As much as I could make out.

(It is agreed between counsel that the witness may sign the stenographic notes in lieu of the long-hand copy, with the same force and effect as if he had signed the long-hand copy itself.)

JOHN GEORGE STAIB.

Samuel Alcorn, a witness produced on behalf of complainant, being duly sworn, deposes and says, in answer to interrogatories proposed by counsel for complainant, as follows:

Q. 484. You are one of the defendants, are you not?
A. Yes, sir.
Q. 485. How long have you been in the flour business?
A. About four or five years.
104 Q. 486. As a member of the firm of William W. Alcorn & Company?
A. Yes, sir.
Q. 487. Your firm, as you allege in the answer, have been selling a flour branded with brand containing the word "Columbia" and so on, in black; was the flour so branded made in Minneapolis, Minnesota?
A. No, sir.
Q. 488. Will you state where it was made?

(By instructions of his counsel witness is advised not to answer the question.)

A. (No answer.)
Q. 489. Was it made by E. Sanderson & Company, of Milwaukee, Wisconsin?

(Under advice of his counsel, witness is advised not to answer the question, and declines to do so.)

A. (No answer.)
Q. 490. How long have you used that brand?
A. Well, the firm of Alcorn, Baker & Company used that brand as far back as 1874, I think, or 1875; somewhere along there.

Q. 491. How do you know?

A. By seeing it entered upon the books as having been sold under that brand.

Q. 492. This identical brand you mean, do you?

A. Yes, sir.

Cross-examination:

C. Q. 493. Mr. Alcorn, in making sales of this flour branded "Columbia patent," did you ever represent it as being made in any particular place?

(Objected to as not proper cross-examination.)

A. No, sir.

C. Q. 494. When you were using it did you know that the Columbia Mill Company had a brand "Columbia"?

105 A. Not for some time afterwards.

C. Q. 495. What was the first knowledge you had of their having such a brand?

A. One of our salesmen showed it to us in the "Northwestern Miller."

C. Q. 496. Did you ever state to anybody to whom you sold it where it was made, or that it was made in Minnesota?

A. No, sir.

C. Q. 497. Did you make the brand for the purpose of imitating any brand of the Columbia Mill Company?

A. Not knowing they had a brand, how could we make one to imitate it?

C. Q. 498. Then you did not do it?

A. We did not do it.

C. Q. 499. Did you sell your flour by sample, trial or by brand?

A. Sample.

(Objected to as not proper cross-examination.)

C. Q. 500. Has this flour ever been sold to anybody upon an inquiry from you for the "Columbia" flour?

(Objected to; same ground.)

A. No, sir.

C. Q. 501. Did you ever tell Runyon, of New Brunswick, that the flour was made in Minnesota?

A. No, sir; told him it was made out of Minnesota wheat?

(Objected to.)

C. Q. 502. Do you know any baker in Plainfield by the name of Liebhauser?

(Objected to.)

A. No, sir.

C. Q. 503. Is there any such baker there?

(Objected to.)

106 A. No, sir.

C. Q. 504. Has there been for the last two or three years any such baker by the name of Liebhauser in Plainfield?

(Objected to.)

A. Not that I ever heard of.

(It is agreed between counsel that the witness may sign the stenographic notes in lieu of the long-hand copy with the same force and effect as if he had signed the long-hand copy itself.)

SAMUEL ALCORN.

STATE OF DELAWARE,
County of New Castle, } *ss:*

I, George W. Bright, a notary public for the county and State aforesaid, being duly commissioned and qualified under the laws of said State to take depositions for use in the circuit courts of the United States, do hereby certify that the foregoing depositions of Wesley L. Gilbert, John George Staib and Samuel Alcorn, were taken before me at the office of Charles G. Guyer, No. 826 Market street, in the city of Wilmington, Delaware, by agreement of counsel for both complainant and respondents in the cause named in caption hereof; and I further certify that during the taking of the testimony counsel for both parties, as therein stated, attended. And I certify that the said Wesley L. Gilbert, John George Staib and Samuel Alcorn were by me carefully examined and sworn to testify the truth, the whole truth and nothing but the truth; and that the depositions were reduced to writing by me in the presence of the witnesses and from their statements, and after carefully reading 107 the same to the witnesses they subscribed the same in my presence. I retain the said depositions in my possession for the purpose of sealing up and transmitting the same with this certificate to the court for which the same were taken. And I do further certify that I am not of counsel or attorney for either of said parties in said depositions and caption named, or in any way interested in the event of the said cause named in the caption.

In testimony whereof, I have hereunto set my hand and affixed my official seal, this 12th day of October, A. D. 1888.

GEORGE W. BRIGHT,
Notary Public.

[SEAL.]

108 STATE OF DELAWARE,
County of New Castle, } *ss:*

John George Staib, *who*, being by me duly sworn, deposes and says that he is a baker, doing business at No. 314 Market street, Wilmington, Delaware; that he buys flour from William W. Alcorn & Company; that he has purchased from them flour branded "Columbia patent;" that the said flour was not represented as the flour of the Columbia Milling Company of Minneapolis, and was not purchased by this deponent as such flour; that he was not induced to buy it supposing it to be the flour of the Columbia Milling Company; that, in his judgment, the "Columbia patent" purchased from Alcorn and Company is as good as any spring-wheat patent he has bought. He has used the flour of the Columbia Milling Company, and knew when he purchased "Columbia patent" from Alcorn and Company that he was not purchasing flour of the Columbia Mill Company. Further deponent says that, to the best of his knowledge, he purchased the "Columbia patent" from Alcorn and Company before he bought the Columbia flour from Linnard and Gibbs. Further deponent says that one P. H. Gunckel, representing himself as the attorney for the Columbia Milling Company, accompanied by one H. B. Delaney, a salesman in the employ of Linnard and Gibbs, did call on deponent and did try to secure an affidavit from deponent stating that he was deceived in buying said flour from Alcorn and Company, which he declined to do, stating that he was not deceived, and told them that the flour was as good as any flour he ever had. Deponent is shown a copy of an affidavit, with 109 his signature thereto, which says he was deceived into purchasing this flour, thinking it was the flour of the Columbia Milling Company. Deponent did sign an affidavit, supposing that it only contained the statement that he had bought flour from Alcorn and Company branded "Columbia patent." The facts contained in said affidavit are not true, and my signature was obtained to it through a false statement as to its contents.

(Signed) JOHN GEO. STAIB.

Sworn and subscribed to this seventh day of May, A. D. 1888, before me—

HENRY J. CUPPEN,
Notary Public.

Exhibit Staib's Original Affidavit. Geo. W. Brightly, notary public. Oct. 12th, 1888. John George Staib.

110 Circuit Court of the United States for E. D. Pa.

Columbia Mill Co.
vs. } In Equity.
Wm. W. Alcorn *et al.*

State of Delaware,
County of New Castle, } *ss:*

John George Staib, being first duly sworn, deposes and says that he is a baker at the city of Wilmington, Delaware; that he purchased flour from said defendants as being Columbia flour in the years 1887 and 1888; that the flour so purchased was branded on the heads with a brand containing the word "Columbia," and that he gave to Horace B. Delany the head of one of the barrels of said flour barrels which contained the said brand, and deponent says that when he purchased said flour he knew the reputation of complainant's flour and supposed he was buying such.

(Signed) JOHN GEO. STAIB.

Sworn to and subscribed before me this 28th day of April, 1888.
THOMAS R. LALLY,
[SEAL.] *Notary Public for Del.*

(Office copy.) Complainant's Exhibit Staib Affidavit. Geo. W. Bright, notary public.

111 *Testimony in Rebuttal.*

Circuit Court of the United States for the Eastern District of Pennsylvania.

THE COLUMBIA MILL COMPANY
vs. In Equity.
WILLIAM W. ALCORN *et al.*

Evidence for the complainant, taken, pursuant to the sixty-seventh rule of the Supreme Court of the United States, in equity, as amended, before me, Sylvester J. Murphy, special examiner.

PROVIDENCE, RHODE ISLAND, *May* 18, 1889.

Present: W. C. Strawbridge, Esq., of Strawbridge & Taylor, of Philadelphia, Pa., of counsel for complainant; James Alcorn, Esq., of Philadelphia, Pa., of counsel for defendants.

It is agreed between counsel for the above-named parties that Sylvester J. Murphy, a notary public in and for the State of
112 Rhode Island, may act as examiner to take and report the following testimony to the court.

HORACE S. WADE, a witness on behalf of the complainant, being duly sworn, deposes as follows:

Q. 505. What is your age, residence and occupation?

A. I am 38; flour business; I reside and do business in Boston.

Q. 506. What connection, if any, have you with the complainant in this case, The Columbia Mill Company?

A. I am vice-president and selling agent.

Q. 507. Are you acquainted with the defendants in this case?

A. I am.

Q. 508. Did you at any time prior to the beginning of this suit visit the defendants; if so, at what time, and on what business?

A. I did visit them before the beginning of this suit to ascertain if they were using a brand of "Columbia" flour which I understood they had been using.

Q. 509. What did you on the occasion of that visit say to the defendants in regard to their use of the brand "Columbia" on flour which you understood that they had been selling?

(Objected to as not being in rebuttal, he having already testified in chief to that.)

A. I asked Mr. William Alcorn if he had been using the brand "Columbia" on flour which they had been selling, and he said they were using it. I then asked him if he would let me see one of the flour barrels with the brand on it, and he showed me one. It looked to me very much like our brand of "Columbia," and I told him that I thought it was an infringement, and that I wanted him to stop using it.

113 Q. 510. What reply did Mr. Alcorn make to your request that he should stop using the brand "Columbia"?

(Objected to on same ground.)

A. At first he refused to stop using it. I then told him that I did not want to have any trouble about it, but it was a matter of vital importance to us, and that we should have to protect our interest, and after discussing the matter with him for some time, and telling him we should have to bring suit unless he did stop it, he agreed not to use it any more. I then supposed the whole matter was settled, but learning some time after that he was again selling a brand of flour "Columbia," I notified my partners at the mill and we began suit.

Q. 511. Did the flour branded "Columbia," and sold by the defendants, interfere with the sales of the "Columbia" brand of flour by you and your agents?

(Objected to on same ground.)

A. It did.

Q. 512. How did the quality of defendants' flour branded "Columbia" compare with the quality of your flour branded "Columbia"?

(Objected to on same ground.)

A. It was not as good.

Cross-examination by Mr. ALCORN:

C. Q. 513. Mr. Wade, you are the vice-president of the Columbia Mill Company?

A. I am.

C. Q. 514. Have you stated all the conversation that took place between you and Alcorn & Company upon your visit to them?

A. I cannot recollect the entire conversation. I think I have stated the vital points.

114 C. Q. 515. Mr. Wade, what is your brand that you speak of?

A. "Columbia."

C. Q. 516. What else is on the barrel head besides "Columbia"?

A. Well, at the top it says "Columbia Mill Company," and then, directly under the "Columbia Mill Company," in a semicircle, at the top, in blue, directly under that, in red letters, "Columbia,"—large red letters which go straight across the centre of the barrel; and, in a semicircle at the bottom, "Minneapolis, Minn." Upon my soul I do not know what the rest of it is. We always sell our brand under the brand which is known to every one as the brand "Columbia."

("Northwestern Miller" of February 22d, 1889, shown to witness.)

C. Q. 517. Is that your brand as registered?

A. "Columbia" printed in red letters on horizontal lines surrounded by circle formed of the words "Columbia Mill Company," &c. Well, the &c. there covers the rest of it. I did not register the brand myself and I do not know just how they registered it. The "Columbia" on a horizontal line is correct, and I should say—it is a very difficult thing; they have made it altogether, too—they have generalized it there; I cannot tell you just how they registered it. It is correct as far as it goes.

C. Q. 518. And the date 1886, is the correct date of registration?

A. That I don't know.

C. Q. 519. And you are the vice-president of the company?

A. I am the vice-president of the company, but my principal business is selling flour. The manager at the mill looks after all that part of it.

115 C. Q. 520. What is the brand of the defendants that you speak of as resembling yours?

A. "Columbia."

C. Q. 521. What else is on the barrel head?

A. I have not seen the brand for some time. I did not take particular notice of it. The general effect seemed to me to be that it would impress an ordinary purchaser as our brand.

C. Q. 522. Do you know what colors there were?

A. The brand I saw and first talked with Mr. Alcorn about was in black.

C. Q. 523. All in black, was it?

A. All in black at that time.

C. Q. 524. Have you seen any other brand of the defendants with the word "Columbia"?

A. I have not myself.

C. Q. 525. To whom do you make your sales, Mr. Wade?

A. To jobbers, generally.

C. Q. 526. When you called on Mr. Alcorn, did he say anything to you about that if you would show him that you had the right to that brand he would stop using it?

A. I cannot recall that he did.

C. Q. 527. Did the parties in Philadelphia who informed you of Alcorn having that brand tell you that Alcorn told them that it was not your flour?

(Objected to as simply calling for a hearsay.)

A. Brecht & Hughes told me that a flour was brought to them by an agent of Mr. Alcorn which the agent said was "Columbia." It was offered to them for less than they knew they could buy the flour of us, knowing that our flour has a reputation for being of even grade ordinarily. Nothing was said about its being our flour 116 until, noting that the price was below what they knew they could purchase of us for, they looked at the sample, and then made the remark "Why, this doesn't seem to be up to the standard."

Up to that time they had supposed it was our flour, but when they said, "This doesn't seem to be up to the standard," the agent said, "This is not the Columbia Mill Company's flour." They told me that up to that time they supposed it was.

C. Q. 528. Which of your customers have failed to purchase from you, Mr. Wade, on account of the defendants selling a flour branded with the word "Columbia"?

A. We sell largely to J. C. Smith & Co., Newark, New Jersey, and while they still continue to buy flour of us, we do not think that their purchases were as large as they would have been if they had not felt that the two brands had conflicted.

C. Q. 529. And is that the only party?

A. Our sales in Philadelphia have fallen off materially within the past two years, while the grade of flour has not been objected to. We feel that many of the trade object to selling a brand of flour feeling that there is another one in the market that is liable to be mistaken for it, and we know that the Columbia flour sold by Alcorn & Co. has affected our sales.

C. Q. 530. Mr. Wade, do J. C. Smith & Co. buy any flour from Alcorn & Co.?

A. Not that I am aware of.

C. Q. 531. Who is your agent in Philadelphia?

A. The term "agent," I think, perhaps is a little misleading. We did sell the brand "Columbia" to Linnard & Gibbs, but their purchases falling off within the last two years very materially, we are now offering the brand to any one who will buy it.
117 We formerly gave them the exclusive control of the brand "Columbia."

C. Q. 532. Do Linnard & Gibbs buy any flour, to your knowledge, from Alcorn & Co., or did they buy any flour from your agents?

A. That I don't know.

C. Q. 533. Do you know whether they ever purchased from Alcorn & Co. the flour in which the word "Columbia" forms a part of the brand?

A. I don't know that they do. They would hardly be apt to purchase of them, because they sell to the same class of customers, I think.

C. Q. 534. When did Linnard & Gibbs cease to be your sole agents?

A. About the first of this year.

C. Q. 535. And have you given the reason why they ceased to be, the only reason?

A. I wrote them the last of 1888 telling them that their purchases were falling off and we wanted to know whether they could not purchase more of us or not, and when we found they could not, we made this other arrangement.

C. Q. 536. You say, Mr. Wade, that the flour of Alcorn & Co. is not the equal of your flour branded "Columbia." When did you test the flour of Alcorn & Co., branded "Columbia patent"?

A. I did not test the flour, because it was not necessary, knowing from what mill it came.

C. Q. 537. Did you know when you called on Alcorn & Co., from what mill it came?

A. No, I did not.

C. Q. 538. When did you learn from what mill it came?

A. I cannot give the exact date; it was some time ago.

C. Q. 539. About what time?

118 A. I think that will have to cover it; it was some time ago.

C. Q. 540. Was it this year?

A. No.

C. Q. 541. Was it last year?

A. Yes.

C. Q. 542. Was it prior to last year?

A. I should say, roughly estimating it, it was over a year ago.

C. Q. 543. Was it since this suit was brought?

A. That I can't say.

C. Q. 544. From whom did you learn it, Mr. Wade?

A. I learned it from the manager of the Columbia Mill Company, Mr. Zeidler.

C. Q. 545. Did he tell you how he learned it?

A. Yes.

C. Q. 546. How?

A. There was some flour in transit, as I recall it, branded "Columbia," and the mill company was notified by the agent of one of the transportation companies that there was some "Columbia," which they supposed was ours, and we traced the matter up and found it was some going to Messrs. Alcorn & Co., and that it was manufactured by Sanderson & Co., Milwaukee.

C. Q. 547. Then when you speak of the flour of Alcorn & Co. not being equal to yours which is branded "Columbia," it is not because of having tested Alcorn & Co.'s flour?

A. It is because I knew it was manufactured by Sanderson & Co., and it is admitted that their flour is not equal to ours.

119 C. Q. 548. And for the reasons which you have stated, you say that the flour of Alcorn & Co. is not the equal of yours?

A. Yes.

C. Q. 549. How many brands of spring-wheat patents have you, Mr. Wade?

A. We have our leading mill brand "Columbia," and we have several others that we occasionally brand for various customers.

C. Q. 550. Name some of them, please.

A. We brand that universal brand "Superlative" that is used by a great many mills, and "Best," which is used by a great many mills. We have a brand "Golden Rod." We only brand a limited number of barrels of these brands.

C. Q. 551. Is that all of the brands?

A. No, we have several other brands which we use occasionally.

C. Q. 552. And on the barrel heads of those brands is the name of your mill, "Columbia Mill Company"?

A. On the "Superlative" and "Best."

C. Q. 553. And on the others?

A. Really, we use those brands so seldom I do not know how they are branded. Anybody who wants "Columbia" and wants a special brand on it that doesn't conflict with anybody else, they get that brand.

C. Q. 554. And in doing that you follow the custom of all the mills, do you not?

A. Yes; sometimes the barrel head has not the mill name on it

C. Q. 555. What percentage of the flour made by your company is patent?

A. It varies according to the quality of the wheat of each crop.

C. Q. 556. What has it been, just about?

120 A. It will average between sixty and sixty-five per cent. probably.

C. Q. 557. Mr. Wade, when did the greatest decrease in your sales in Philadelphia occur?

A. I should say they commenced falling off, about as near as I can get at it, some time within the last two years.

C. Q. 558. When the most rapidly?

A. That I could not answer without referring to my book, which I haven't got with me.

C. Q. 559. Haven't you had difficulty in disposing of some of your flour at the warehouse of Brecht & Hughes recently, or at some warehouse there?

A. One of my competitors stated that some Columbia flour stored on Broad street was not up to grade. I was very much surprised and investigated the matter; went down to Philadelphia, sold the flour at the time at the highest market price spring-wheat patents were selling for; had it inspected and it proved right.

C. Q. 560. When was that?

A. During the winter.

C. Q. 561. Was it not at the time of the abnormal rise in flour that you sold it?

A. No, it was not; it was when the market was declining.

C. Q. 562. Before or after the rise?

A. After the highest prices.

C. Q. 563. You do not recall the month of the year?

A. No; it was in the winter; I can't say what month.

C. Q. 564. Do you recall how many barrels of flour you had at Philadelphia?

A. We shipped flour to Philadelphia about a year ago last
121 May which we offered to sell at that time in the vicinity of
$5.00 a barrel. This flour we sold all the way from about $5.50 to $7.20 a barrel; then after the boom trade became very dull. There were large stocks of flour in Philadelphia, spring-wheat patents. I then heard that it had been stated that some of the flour was not "up," but it was not from people who were using it.

C. Q. 565. From whom was it?

A. It was stated by one of my competitors.

C. Q. 566. Who was that?

A. Mr. Wilson.

C. Q. 567. Did not Brecht & Hughes so state it, too?

A. Brecht & Hughes did not tell me; I cannot recall that they had any complaint of our flour.

C. Q. 568. Who is Mr. Wilson?

A. Salesman for Beatty & Hay.

C. Q. 569. How long had that flour remained in Philadelphia, Mr. Wade, before it was disposed of?

A. We shipped originally, I should say at a rough estimate, between four and five thousand barrels there, all of which cost us, I should say, less than $5.00 laid down in Philadelphia. We had originally offered to sell this flour to the people we shipped it to—Brecht & Hughes, J. S. Wesley & Sons, J. W. Allen & Co., Linnard & Gibbs—in the vicinity of $5.00. They, believing that the market was going lower, agreed to take it, and we agreed to make prices with them later. Most of them purchased the flour—portions of it at a considerable advance—and it was all closed out, with the exception of three or six hundred barrels, I think, at Brecht & Hughes', and the lot at J. S. Wesley & Sons, some time ago. These two last lots were sold at the market value of choice patents during the winter, I should say.

122 C. Q. 570. How long did that portion of it which it was said was not up to grade remain in Philadelphia before being disposed of?

A. Well, it was disposed of in lots. One man, shortly after the statement was made, took three hundred barrels, fearing to take more, as he had heard it was not "up," but he liked it so well that he took three hundred more, and then after that took another one hundred and fifty.

C. Q. 571. I asked you how long it remained in Philadelphia before being disposed of.

A. No longer than is very often the case.

C. Q. 572. How long is that; was it a year or two years, or how long?

A. We had a very handsome profit in this flour and didn't like to crowd it. We wanted to get perhaps a little more for it than other parties were selling for. The last of it was not disposed of until about nine months.

C. Q. 573. Mr. Wade, how long have you been in the flour business?

A. I have been in the flour business—in the jobbing business and manufacturing of flour—some sixteen years; I think about sixteen years.

C. Q. 574. Is your concern a stock concern?

A. It is a corporation.

C. Q. 575. Are you a stockholder in it?

A. I am a stockholder.

C. Q. 576. (The "Providence Journal" of Saturday, May 18th, shown witness, and he is referred to the quotations of the New York produce market, and he is asked to point out the quotations for winter and spring wheat patents.)

(Question objected to as incompetent.)

A. City mill patents $5.35 @ $6.25. Then it states Minnesota clear, $3.65 @ $4.60; ditto, straights, $4.35 @ $5.40; ditto, patents, $4.65 @ $6.10. 123

C. Q. 577. Is the last the quotation of spring-wheat patent?

A. It is so stated here.

C. Q. 578. The last one mentioned, the Minnesota patent, is the quotation of spring-wheat patent?

A. Yes.

C. Q. 579. Is there a separate quotation for winter-wheat patent?

A. Yes.

C. Q. 580. And how is it quoted there?

A. Winter-wheat patents $4.45 @ $5.40.

C. Q. 581. Mr. Wade, is that the usual method of quotations on the markets as to the character of flour, that is, winter wheat or spring wheat?

A. Oh, yes.

Mr. Strawbridge states that the witness, Chas. H. Sprague, not being able to be present to-day, and his brother being out of the city, the taking of the testimony of the witness, Sprague, is adjourned to a future day.

Mr. Alcorn, attorney for the defendants, requests the examiner to certify that under stipulations between the parties, and of being duly notified to attend at Providence on Saturday, May 18th, and that the complainant intended taking the testimony of Mr. Sprague and others, he attended a meeting held before Sylvester J. Murphy, notary public, by agreement between the parties; that Mr. Sprague was present shortly after 10 o'clock at the office of the examiner, and remained in consultation with Mr. Strawbridge and Mr. Wade until nearly 11 o'clock, and then left, and was not examined by the complainant, and subsequently, while the meeting was in progress sent a note of which the following is a copy: 124

PROVIDENCE, R. I., *May* 18, 1889.

"Mr. Strawbridge.

DEAR SIR: I have just received notice of an important occurrence that will keep me very much occupied to-day, as my brother is out of town. If you could postpone the hearing until last of next week, when my brother will be at home, I shall be pleased to devote the necessary time to comply with your wishes.

Very truly yours, CHARLES H. SPRAGUE."

Mr. Alcorn states that he is willing to go to Mr. Sprague's office to-day.

Mr. Strawbridge states that from the note which Mr. Alcorn has just requested the examiner to copy upon the record, and from the statement of Mr. Wade, now present, that he has been to Mr. Sprague's office and that Mr. Charles H. Sprague cannot attend to-day, and that his brother is out of the city, it appears that the complainant, by reason of no fault of his own, is unable to call these witnesses to-day. He says that complainant will do all in its power to make the time and place of the examination of said witnesses convenient to the counsel for the defendant.

Mr. Strawbridge also states that Mr. Wade has just telephoned Mr. Sprague's office, and is informed that he is not there, and will not be there until late this afternoon; that, therefore, in view of what Mr. Sprague has already said as to his inability to testify to-day, his examination is postponed to a time to be fixed on further notice.

Mr. Alcorn states that he is willing to wait until this afternoon and have Mr. Sprague's testimony taken.

125 UNITED STATES OF AMERICA, }
District of Rhode Island. }

I, Sylvester J. Murphey, a special examiner duly appointed by agreement of parties to take testimony under and pursuant to the sixty-seventh rule of the Supreme Court of the United States, in equity, as amended, to be used in the above-entitled cause, which evidence is hereto prefixed, do hereby certify that on the 18th day of May, 1889, said Horace S. Wade personally appeared before me at my office, No. 26 Westminster street, in the city of Providence, in said district of Rhode Island, and being by me first duly cautioned and sworn did thereupon depose as appears in the foregoing deposition.

I further certify that I am not of counsel nor attorney for either of the parties in said cause, nor in any way interested in the event thereof.

Attest: SYLVESTER J. MURPHEY,
Special Examiner.

126 Circuit Court of the United States for the Eastern District of Pennsylvania.

THE COLUMBIA MILL COMPANY }
vs. }
WILLIAM W. ALCORN *et al.* }

To the above-named respondents or James Alcorn, Esq., their solicitor.

GENTLEMEN: You will please to take notice that George A. Klenck and Fred. J. Klenck, witnesses, whose testimony is necessary in this case, and who reside at Oakland City, in the State of Indiana, *and* will be examined *de bene esse* on the part of the complainant, before David M. Martin, Esq., a notary public, residing at said Oakland City, at his office in said city, on the 21st day of May, A. D. 1889, at 10 o'clock in the forenoon, according to the rules of this court and the act of Congress in such case provided, at which time and place you are notified to appear and take such part in said examination as you may be advised and shall be fit and proper.

Yours, etc., P. H. GUNCKEL,
Solicitor for Complainant.

Dated Minneapolis, Minn., May 11th, 1889.

127 STATE OF PENNSYLVANIA, }
County of Philadelphia, } *ss:*

F. Norman Dixon, being duly sworn according to law, deposes and says that he, upon Wednesday, May 15th, 1889, served a true and correct copy of the within notice upon James Alcorn at his office, 223 South Sixth street, in the city of Philadelphia, by handing the same to said Alcorn personally.

F. NORMAN DIXON.

Sworn and subscribed before me this 15th day of May, A. D. 89.

[SEAL.] ALF. H. FABER,
Notary Public.

128 Circuit Court of the United States for the Eastern District of Pennsylvania.

THE COLUMBIA MILL COMPANY }
vs. } In Equity.
WILLIAM W. ALCORN *et al.* }

STATE OF INDIANA, }
County of Gibson, } *ss:*

Be it remembered that on this 28th day of May, 1889, I, David M. Martin, a notary public in and for the county and State aforesaid, and duly commissioned and qualified under the laws of the United States to take depositions for use in the circuit courts of the United States, did call and did cause to be and personally appear before me at my office in Oakland City, county and State aforesaid, pursuant to the notice hereto annexed and the stipulations and agreements of counsel in said cause, George A. Klenck to testify and the truth to say on the part of the complainant in the above-entitled cause. And the said GEORGE A. KLENCK, being of lawful age and having been by me first cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said George A. Klenck, and he did thereupon depose, testify and say, in answer to interrogatories proposed to him by P. H. GUNCKEL, counsel for complainant, as follows: 129

Q. 582. Please state your name, age, residence and occupation.

A. My name is George A. Klenck; age, 32 years; residence, Oakland City, Indiana, and occupation, a practical miller.

Q. 583. With what mill are you connected?

A. Columbia Mill Company, of Oakland City, Indiana.

Q. 584. Is that mill company a corporation or copartnership?

A. A copartnership composed of George A. Klenck and Frederick J. Klenck, my brother.

Q. 585. How long has this copartnership of your brother and yourself been in existence?

A. Since October 6, 1885.

Q. 586. Who operated the mill prior to that time?

A. First two years it was operated by George A. Klenck (myself) and Edward H. Williams. I built the mill myself in 1881.

Q. 587. What kind of wheat—spring or winter wheat—has been ground in your mill?

A. Winter wheat; except that at one time we ground about two car-loads of spring wheat as an experiment.

Q. 588. What is the capacity, and about what is the output pe annum of your mill?

A. Capacity about 150 barrels per day, and we run about eig months in a year.

Q. 589. Are you familiar with the brands that have been use continuously or from time to time by your mill for its flour?

A. Yes.

130 Q. 590. Will you please state the names of the brands your mill has used?

A. "Pride of Columbia," "Crown," "Advance" and "Baker's Delight."

Q. 591. Have these brands been used on sacks and barrels?

A. On sacks only.

Q. 592. This brand, "Pride of Columbia," has it been used by you at all to brand flour in barrels?

A. No, it has not.

Q. 593. To whom, or what class of purchasers, has your flour branded "Pride of Columbia" been sold by your mill?

A. Only to one firm, John M. Klenck & Co., of Evansville, Indiana.

Q. 594. What is the business of the firm of John M. Klenck & Co.?

A. They are local flour dealers. Their principal business is wholesale and retail grain business.

Q. 595. Has any flour at any time made by your mill and branded "Pride of Columbia," been shipped elsewhere than to J. M. Klenck & Co., of Evansville?

A. It has not.

Q. 596. Will you kindly furnish to the notary a fac-simile of your Columbia Mill Company's brand "Pride of Columbia" to be attached as an exhibit to your deposition?

A. Yes, I hand to the notary one of our flour sacks containing brand referred to, to be marked Exhibit "A."

Q. 597. Is or is not that brand a fac-simile of the brand as it has been during the whole time of the use of said brand by your mill?

A. It is.

131 Q. 598. Has flour of your manufacture, and branded with a brand alluded to, at any time to your knowledge been in conflict or competition with the complainant's brand "Columbia"?

A. To my knowledge, it has not.

Q. 599. In your judgment is or is not the brand which you use in anywise in conflict with complainant's brand "Columbia," and you may please give your reasons for your opinion in the matter.

A. First, it does not conflict with their brand "Columbia," as ours is for winter-wheat flour, and their brand "Columbia" is used for spring-wheat flour only. Second, because we use "Pride of Columbia," and have a brand that is quite different in appearance.

Q. 600. Have you ever had any conversations or correspondence with complainant concerning its use or your use of the word "Columbia"?

A. I never have myself, but understood from my partner that the complainant had been requested to allow us to use our brand "Pride of Columbia" on spring-wheat flour handled by John M. Klenck & Co. This the complainant declined to do and the matter was dropped.

Q. 601. Has your concern ever regarded the use of the word "Columbia" by the complainant for its spring-wheat flour as a violation of any rights of yours?

A. We have not.

Q. 602. In your opinion, as a manufacturer and seller of flour, would or would not the use of the word "Columbia" or any other brand by two different concerns, the one using it for spring-wheat flour, and the other for winter-wheat flour, be calculated to mislead or create confusion in the trade?

A. It would not, as the difference between spring-wheat flour and
winter-wheat flour is easily detected and well understood by
132 the dealers and the two are regarded as of different classes.
Of course the brands should be marked in some way to show
that the one was spring-wheat flour and the other winter-wheat
flour, otherwise the purchaser would not know the difference.

Q. 603. Have you had any correspondence with the defendants concerning this case, and if you have will you kindly offer it in evidence?

A. We have had some correspondence concerning our brand, also a telegram from them asking if we used the word "Columbia," and we answered them by telegram of which I hand the notary a copy to be filed herewith and marked Exhibit "B." We had a letter from defendants which I hand to the notary to be marked Exhibit "C," and attached to my deposition. We wrote them an answer of which a copy is given in the letter of James Alcorn of May 23d, 1889, which I hand to the notary, to be attached hereto and marked Exhibit "D."

GEORGE A. KLENCK.

STATE OF INDIANA, }
County of Gibson, } *ss:*

I, David M. Martin, a notary public in and for the county and State aforesaid, do hereby certify the reason for taking the foregoing deposition is and the fact is that the testimony of the said witness is material and necessary for the complainant in the above-mentioned cause, and that the said witness lives and did live at the time of taking said depositions in Oakland City, Gibson county, Indiana, the same being at a greater distance than one hundred miles from the city of Philadelphia, State of Pennsylvania, where the court in which it is expected said cause will be tried was appointed by law to be held, to wit: about one thousand miles.

133 I further certify that a notification of the time and place of taking said deposition signed by the complainant's solicitor was served on the solicitor for the defendants as appears by the said notice hereto attached, and the time of taking said deposition was postponed by the consent of the parties to the 28th day of May, 1889, as appears of record and as appears by the letter of James Alcorn, defendants' solicitor, hereto annexed.

I further certify that on this 28th day of May, 1889, at my office in said Oakland City, Ind., I was attended by P. H. Gunckel, solicitor for the complainant, and the witness, George A. Klenck, who was of sound mind and lawful age, and the said witness was by me carefully examined and sworn to testify the truth, the whole truth and nothing but the truth, and his deposition was by me reduced to writing in the presence of the witness and from his statements, and after carefully reading the same to the witness he subscribed the same in my presence. And I certify that the taking of the deposition of the said witness was commenced at 10 o'clock of the forenoon on said 28th day of May, 1889, and was concluded before noon on said day. And I certify that I am not of counsel nor in anywise interested in the event of said cause. I have retained the said deposition in my possession for the purpose of sealing up and transmitting the same with the exhibits and with this certificate of the reasons aforesaid for taking said deposition to the court for which the same was taken.

In witness whereof I hereunto subscribe my name and affix my official seal, this 28th day of May, 1889.

DAVID M. MARTIN,
Notary Public.

[SEAL.]

(Here follows flour sack marked p. 134.)

135 Circuit Court of the United States for the Eastern District of Pennsylvania.

THE COLUMBIA MILL COMPANY
vs.
WILLIAM W. ALCORN *et al.*

STATE OF WISCONSIN,
Milwaukee County, } *ss:*

Deposition of Harry B. Sanderson, taken before me, John H. Myers, a notary public in and for the county and State aforesaid, on notice hereto attached, in an action pending in the United States circuit court, eastern district of Pennsylvania, on the 29th day of May, A. D. 1889, at 2 o'clock p. m., by agreement of parties, at the office of said John H. Myers, No. 395 East Water street, in the city of Milwaukee, county of Milwaukee and State of Wisconsin, plaintiff being represented by its counsel, P. H. Gunckel, Esq., and defendants by their counsel, James Alcorn, Esq.

HARRY B. SANDERSON, a witness of lawful age, being produced on behalf of complainant, and being by me duly sworn to testify the truth, the whole truth and nothing but the truth, in answer to interrogatories proposed to him, testifies as follows:

136 Direct examination by Mr. GUNCKEL:

Q. 604. Please state your name, age, residence and occupation.
A. Harry B. Sanderson is my name. I am thirty years of age. I reside in Milwaukee; am a manufacturer of flour.
Q. 605. Of what firm?
A. E. Sanderson & Company.
Q. 606. At what place is the firm of E. Sanderson & Company engaged in the manufacture of flour?
A. In the city of Milwaukee.
Q. 607. How long has it been engaged in that business?
A. Since 1848.
Q. 608. Has that firm, to your knowledge, had business transactions with the defendants?
A. Yes, sir.
Q. 609. Of what character?
A. Sales of flour made to them.
Q. 610. Of the sales of flour made to them, was any of the flour branded with the word "Columbia"?
A. There was.
Q. 611. By whom was it so branded?
A. By our flour packers.
Q. 612. By whose authority was it so branded?
A. Mostly mine.
Q. 613. At what time or times was such flour so branded?
A. You mean what date or within what period?
Q. 614. Yes.

A. I cannot say definitely.

Q. 615. Give it approximately.

A. Some time within the year 1887.

Q. 616. Down to what period?

A. I could not tell you.

137 Q. 617. Is your firm still branding flour for the defendants with the word "Columbia"?

A. They are not.

Q. 618. When and under what circumstances did they cease to so brand it?

A. On the reception of a notice from Mr. Gunckel saying that we were infringing on the rights of the Columbia Mill Company, who claimed the ownership of the brand; and we then wired Messrs. Alcorn & Company that we should have to discontinue the using of the brand as it belonged to other parties. They wired back to us to discontinue using that brand and return it to them.

Q. 619. And you then discontinued its use, did you?

A. We did. I will say that possibly we may have written instead of telegraphing. The notice sent to us by Mr. Gunckel was enclosed in that letter.

Q. 620. To what extent did you so brand flour for the defendants?

A. A small percentage of the sales made to them.

Q. 621. To what number of barrels?

A. I can't say definitely. Somewhere between six and ten thousand I should say—I guess.

Q. 622. What color or colors were there in the brand that contained the word "Columbia"?

A. It was all black with the exception of a very few cars.

Q. 623. How were these exceptional barrels branded?

A. Red and blue, or red and black; I can't remember which.

138 Q. 624. Previous to the time you used this brand for the defendants, as you state, had you used the word "Columbia" as a brand for the flour for yourselves or for others?

A. Not that I can remember of.

Q. 625. Was it at your own instance or at the request of the defendants that you applied this brand to flour sold to them?

A. The brand was sent to us by Alcorn & Company, of Philadelphia.

Q. 626. Of what kind of wheat was the flour made that you so branded for the defendants?

A. From wheat purchased by us in Minnesota, Dakota and Wisconsin. It was spring wheat.

Q. 627. These defendants have been customers of yourselves to a large extent, and still are so, are they not?

A. We have sold them a good deal of flour and are still doing so.

Q. 628. Since the time referred to as having received notice from me to cease infringing, have you branded any flour for the defendants with the word "Columbia"?

A. We have not.

Q. 629. To whom was the flour shipped that you so branded for defendants?

A. We shipped at the different points to which defendants ordered it; shipped either direct to them on order or to the order of some bank, Alcorn & Company to be notified on arrival.

Q. 630. In all such cases you received your payment from the defendants, and not from the parties they sold to, or other parties?

A. We received our pay entirely from the defendants.

Q. 631. You did not answer the notice that you referred to as having received from me, did you?

A. I did not.

139 Q. 632. And the complainant afterwards brought an action for infringing—an injunction against you for using this brand; and that action is still pending, is it not?

A. It is.

Q. 633. Can you recollect the circumstances that led you to brand a portion of this flour in colors, instead of plain black?

A. I cannot, unless I could see the letter books or letters at the office. Of course, it must have been from orders received from Alcorn.

Q. 634. Is it or is it not a fact that the difference there was in the brand, either as to wording or as to color, was there at the instance or request of the defendants?

A. Certainly.

(Foregoing testimony objected to by defendants as not being rebuttal.)

Cross-examination by Mr. Alcorn:

C. Q. 635. Mr. Sanderson, the stencil or brand spoken of was the property of the defendants, was it not?

A. It was.

C. Q. 636. And when used by you, it was merely at their request?

A. Certainly.

C. Q. 637. Can you roughly estimate what proportion of the flour which you sold them was not branded from your patent?

A. I cannot.

C. Q. 638. What proportion of the flour was not branded "Columbia"?

A. The larger portion, very much so.

140 C. Q. 639. The brand used by Alcorn & Company was known to you and to them as "Columbia patent," was it not?

A. It was.

C. Q. 640. And the stoppage or your ceasing the use of the brand was at the request of the defendants, was it not?

A. At their order.

C. Q. 641. At that time. Mr. Sanderson, you had not entered into the question of whether there had been an infringement, or not?

A. I knew nothing whatever about it.

C. Q. 642. The flour so branded by you for them as you have stated, was all spring-wheat flour, was it not?

A. It was.

C. Q. 643. When you received a letter from them—or telegram from them—not to use the brand, there might have been on the road at that time cars of flour which could not be sent for some time after that?

A. There was a car at that time in the railroad warehouse here which had not been shipped; and of course there must have been several others on the way.

C. Q. 644. Was it not about the time when they had some difficulty in receiving the flour; was that about the time when it way so long on the way?

A. There was a time when they were very long; when there was a long time in getting flour to a destination; whether it was then, I cannot say. It was in the winter season some time, I know.

Redirect examination by Mr. GUNCKEL:

R. Q. 645. You were asked by Mr. Alcorn, if this was not "Columbia patent." Was not the rest of the flour that you spoke 141 of and which constituted the larger portion of the flour sold to the defendants, also designated by you as patent?

A. It was; it was patent flour sold them. It was not branded patent, all of it; a large portion of it was branded in a letter brand.

R. Q. 646. Was or was it not, quite a common thing to use the word "patent" in connection with other words of the flour brand?

A. It is sometimes so used and sometimes not. The word "patent," as the word "superlative," is a great many times used.

R. Q. 647. What do you understand the meaning to be of the word "patent"?

A. You mean the whole story as it occurred originally? Well, patent flour is that portion of the flour which brings the most money, and which is made out of the best part of the wheat. The term "patent" is really an obsolete form.

R. Q. 648. Let me question what you mean by your last expression, the term "patent" is really an obsolete form.

A. Years ago, when purifiers first came into existence, the few mills which first put them in made a flour which was called patent flour, because of the patent on the purifiers which made that flour. From that the term "patent" has been derived.

R. Q. 649. It is a term applied to winter-wheat as well as spring-wheat flour, is it not?

A. Certainly.

R. Q. 650. Were not the letters in the word "patent" in the brand by the defendant- large letters?

A. They were the same size as the word "Columbia."

R. Q. 651. Ordinarily, when the word "patent" is on the 142 flour merely to designate the quality of the flour, are not the letters in small type—smaller than those of the brand?

A. If they do not come in the same line as the brand, they do not much, because the brand itself, being in the middle, takes up the larger portion.

R. Q. 652. Mr. Sanderson, the flour which you sold to the defendants under other brands than the "Columbia patent," was it not the same flour as that branded "Columbia patent"?

A. Exactly; identically the same.

(It is stipulated and agreed between counsel that signature of this witness to his deposition is waived; deposition to have the same force and effect as though it were duly signed.)

(Defendant objects to both direct and redirect examination as not being rebuttal.)

Recross-examination by Mr. ALCORN:

R. C. 653. Mr. Sanderson, at the time you received the notice from Mr. Gunckel, did not you know the brand of the complainants, of which they claimed to be the owners?

A. I did not.

R. Q. 654. When you say in your testimony that you could not use a brand owned by somebody else, did you have any knowledge of the ownership of that brand?

A. I did not.

R. Q. 655. Then, you mean by that, that you did not wish to use a brand of which other parties claimed to be the owners?

A. Certainly.

R. Q. 656. You never would use a brand of flour which you knew other people owned, would you, Mr. Sanderson?

A. No; certainly not.

143 STATE OF WISCONSIN, } ss:
County of Milwaukee,

I, John Myers, a notary public in and for the county and State aforesaid, being duly authorized under the laws of the United States, to take depositions for use in the circuit courts in the United States, do hereby certify, that the foregoing deposition of Harry B. Sanderson was taken before me at my office, No. 395 East Water street, room 27, Mack block, in the city of Milwaukee, county and State aforesaid, on the 29th day of May, A. D. 1889, at 2 o'clock p. m., upon notice hereto attached, counsel for both parties being present during the taking of the said deposition; and I further certify, that the said Harry B. Sanderson was by me carefully sworn to testify the truth, the whole truth and nothing but the truth; and that the deposition was reduced to writing, stenographically, by Alice E. Stager, in presence of the witness, from his statements. And the signature of the said witness, said Harry B. Sanderson, to said deposition was waived, as therein appears. That I have retained the said deposition in my possession for the purpose of sealing up and transmitting the same by mail, together with this certificate, to the court for which the same was taken.

And I do further certify that I am not of counsel, nor attorney for either of said parties in the said action, nor in anywise interested in the event of said cause.

In witness whereof, I have hereunto set my hand and affixed my official seal this 29th day of May, A. D. 1889.

JOHN H. MYERS,
Notary Public, Milwaukee County, Wisconsin.

144 Circuit Court of the United States for the Eastern District of Pennsylvania.

THE COLUMBIA MILL COMPANY *vs.* WILLIAM W. ALCORN *et al.* } In Equity.

Be it remembered that on this 1st day of June, 1889, I, Charles E. Churchill, a notary public in and for the county and State aforesaid, duly commissioned and qualified under the laws of the United States, did call and did cause to personally appear before me, at my office, No. 522 Temple court, in the city of Minneapolis and State aforesaid, pursuant to a notice hereto annexed and stipulations and agreements of counsel on record in said cause, Ernst Zeidler, to testify and the truth to say on the part of the complainant in the above-entitled cause; and the said Ernst Zeidler, being of lawful age and having been by me first cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the matter in controversy, I did carefully examine said ERNST ZEIDLER, and he did thereupon depose, testify and say, in answer to interrogatories proposed to him by P. H. GUNCKEL, counsel for the complainant, as follows, to wit:

By Mr. GUNCKEL:

145 Q. 657. You are the Ernst Zeidler who heretofore testified as a witness on behalf of complainant in this cause, are you not?

A. Yes, sir.

Q. 658. Mr. Zeidler, there has been considerable testimony concerning the difference between winter-wheat flour and spring-wheat flour. Will you please explain what, in your opinion, from your experience in milling and handling flour, those differences are, in a general way?

(By Mr. ALCORN: Objected to as not rebuttal.)

A. The difference arises from the wheat used in the manufacture of spring-wheat flour and winter-wheat flour. Spring wheat contains more gluten and makes a stronger flour—that is, a larger percentage of gluten, and thus more bread to the barrel than winter-wheat flour. There is such a wide difference between spring and winter wheat flour there is no mistaking them by the trade.

Q. 659. Is there or is there not a distinction made in the flour trade between these two kinds of flour?

A. Yes, there is.

Q. 660. Is that distinction generally made in flour quotations and by dealers in flour?

A. Yes, always.

Q. 661. Are the two so qualified and so distinguished in the trade as to be practically different classes?

A. They are practically different classes of flour.

Q. 662. In your judgment, would a brand used upon winter-wheat flour be likely to conflct with a similar brand used upon spring-wheat flour?

(By Mr. ALCORN: Objected to as not rebuttal.)

A. Not to any extent.

146 Q. 663. In one of your previous answers you referred to these flours as "patent;" will you please explain what you mean by the use of the word "patent," and also what, if any, is the common understanding in the trade of the word "patent," used in connection with flour?

(By Mr. ALCORN: Objected to as not rebuttal.)

A. A certain production, or rather a certain percentage of production, goes under that name. It means that the flour is made of the hard particles of the berry out of the clean middlings. The remaining percentage of production are inferior grades, usually called bakers and low grades.

Q. 664. Is or is not the word "patent" a term almost universally used to designate the best grade of the production from both winter and spring wheat from the hard or middlings portion of the berries?

(Objected to as not rebuttal, and also as leading.)

A. It is universally used in that way.

Q. 665. Do you know how the term arose?

A. It came into use from the time that middlings purifiers were used, and introduced in this country.

Q. 666. Do you know whether or not it is customary to use the word "patent" in connection with other words in the flour brands?

(By Mr. ALCORN: Same objection.)

A. Yes, it is customary to so use it.

Q. 667. And when so used, what does it indicate to the trade?

A. It indicates to the trade a certain percentage of the production of the very highest grade of the flour which the mill that uses it makes.

Q. 668. In your judgment, would that word, as used by the defendant- in connection with their brand, indicate to the trade anything different from its usual significance in other brands?

A. It would not.

147 Q. 669. It has been testified by the witness, George D. Hilton, on behalf of the defendants, that the flour your

mill brands "Columbia" is made from soft spring wheat. What is the fact?

A. It is not true. We make a specialty of milling the hard varieties of spring wheat only.

Q. 670. What character of spring wheat is used generally by the mill making what are regarded as the best grades of spring-wheat flour?

A. They are generally using hard varieties of spring wheat.

Q. 671. And what grades of spring wheat are generally used by the mills outside of Minneapolis, making a flour which is sold usually at a little lower price?

A. It depends largely upon the location of the mill. A great many of them use wheat that grows in their locality, and buy harder wheat to mix in with their home-grown wheat.

Q. 672. The grades of harder wheat and those of softer wheat—spring wheat—differ in price, do they not?

A. Yes, according to the various crops. The difference runs from two to ten cents per bushel in favor of the hard varieties of spring wheat. On this crop, for instance, the difference has at times been as much as fifteen to twenty cents per bushel.

Q. 673. A good deal has been said in the testimony of the defendant concerning the use of the words "Minneapolis, Minnesota," and "Minnesota," by mills outside of Minneapolis and sometimes by mills outside the State of Minnesota; what have you to say relative to this matter?

(By Mr. ALCORN: Objected to as not rebuttal.)

A. It is a common abuse.

148 Q. 674. How is it used generally; do the manufacturers usually associate their mill name with such brands?

(By Mr. ALCORN: Same objection and as leading.)

A. Not to my knowledge.

Q. 675. What is the quality of the flour usually so branded by mills outside of Minneapolis, or outside of Minnesota, as compared with the flour made at Minneapolis?

(By Mr. ALCORN: Objected to as not rebuttal.)

A. Some of it is as good and others a good deal worse.

Q. 676. Do you know of a mill located at Columbia, South Dakota?

A. Yes, sir.

Q. 677. What is the name of the mill or mill company?

A. It is the Columbia Milling Company.

Q. 678. Do you know of a brand used by that company prior to a couple of years ago, in which the word "Columbia" appears?

A. Yes, they used a brand "Pride of Columbia" at several places where it came into competition with ours.

Q. 679. Did that brand contain, in addition to the words you have named, any distinguishing device or marks?

(By Mr. Alcorn: Objected to as leading.)

A. Yes, there was a sheaf of wheat on it.

(By Mr. Alcorn: I object to the witness handing something to Mr. Gunckel, and I ask it to be put upon the record.)

Counsel for complainant reads to the notary as a question to be put to the witness the memorandum handed him by the witness and objected to by defendants' counsel, and which is as follows:
49 "Ask me why the outside mills brand their flour 'Minneapolis.'"

(By Mr. Alcorn: I object to this question as being propounded by the witness while testifying.)

A. Because they trade upon the reputation of the Minneapolis flour, it being recognized that Minneapolis flours, or rather that the flours made at Minneapolis are the best flours in the market.

Q. 680. Do you know whether or not the Minneapolis mills have or have not frequent grounds of complaint arising from the abuse you speak of?

(By Mr. Alcorn: Objected to as not rebuttal and as leading.)

A. They have, as far as we are concerned. I cannot speak for the others.

Q. 681. You may state whether or not the bulk of your best grade of flour is sold by you under the brand of "Columbia."

(By Mr. Alcorn: Objected to as leading.)

A. The bulk of our production of patent flours is sold under the name of "Columbia," is sold under that brand.

Q. 682. How is your flour branded "Columbia" quoted in the market with or without anything additional to the brand?

(By Mr. Alcorn: Objected to as not rebuttal.)

A. It is known as "Columbia."

Q. 683. How large a proportionate quantity of your best grade of flour have you sold in the Philadelphia market that was not branded "Columbia"?

(By Mr. Alcorn: Objected to as not rebuttal.)

A. I could not give the exact figures of sales in Philadelphia.

Q. 684. I mean approximately of those grads in question.

A. In Philadelphia a considerable amount of our patent
150 has been sold under other brands because we have so many
customers there. Proportionately more flour has been sold under other brands than "Columbia," in Philadelphia than in other markets.

Q. 685. Is there such a flour manufacturing company as James Dudley & Co. in Minneapolis?

(By Mr. Alcorn: Same objection.)

A. No.

Cross-examination by Mr. **Alcorn**:

C. Q. 686. Mr. Zeidler, you are treasurer and general manager of The Columbia Mill Company, of Minneapolis, the complainant?

A. Yes, sir.

C. Q. 687. How long have you been connected with the mill?

A. Since it was first built.

C. Q. 688. And that was when?

A. 1882.

C. Q. 689. Were you in the milling business before that?

A. Yes, sir.

C. Q. 690. Where and with what concern?

A. With A. A. Freeman & Co., La Crosse, Wisconsin.

C. Q. 691. You were partner there?

A. Yes.

C. Q. 692. Did you have a brand at that time, flour using as any portion of it the word "Columbia"?

A. No, sir.

C. Q. 693. For how long were you connected with that mill?

A. About five or six years, I think.

C. Q. 694. What brand did you use in connection with that mill?

A. "Superlative" and some others.

151 C. Q. 695. What other brands?

A. I don't remember the other brands. "Superlative" was our leading brand.

C. Q. 696. Did you not have "Best"?

A. Not to my knowledge.

C. Q. 697. What was on the barrel and forming the brand?

A. On our stenciling?

C. Q. 698. What words were in that stencil?

A. A. A. Freeman & Co., Superlative, and also perhaps, patent, and the weight, and Minnesota.

C. Q. 699. And that was patent flour?

A. And that was patent flour.

C. Q. 700. Does that mill still use that brand, do you know?

A. I think so; yes, sir.

C. Q. 701. And that mill was located at La Crosse, Wisconsin?

A. It was located at La Crosse, Wisconsin, but ground Minnesota and Dakota wheats.

C. Q. 702. If a mill outside of Minneapolis uses the same wheat as the Minneapolis mills they will grind the same grade of flour, will they not?

A. Yes, if they had the same grade of wheat, and if they use the same machinery.

C. Q. 703. The witness is shown the "Northwestern Miller" of May 1st, 1889, and is asked whether that is their brand.

(By Mr. **Gunckel**: Objected to as not proper cross-examination and immaterial.)

(Mr. Alcorn says that as he had no opportunity of examining Mr. Zeidler in the examination in general, he thinks he is allowed some latitude in this examination.)

A. All except as to colors.

C. Q. 704. And what are the colors?

152 A. Blue and red.

C. Q. 705. What portion of it blue and what red?

A. The word "Columbia" is in red, and the balance of it is in blue.

C. Q. 706. All of your flour which is branded with the brand in which the word "Columbia" is used contains all of the words on his advertisement?

A. Contains all the words in that brand,—in that specimen of e brand.

C. Q. 707. In either case this is, Mr. Zeidler, the name of your mill?

A. I want to qualify that. Except as to sack packages of different weight; they, of course, don't have the words "196." This answer refers to barrels.

C. Q. 708. This refers to barrels. This is the name of the mill used in all brands in which the word "Columbia" is a part?

A. Yes, sir.

C. Q. 709. And a brand similar to this, although different in shape, containing the same words, is used on sacks also, is it not?

A. It is the same wording on the sacks, with the exception of the weight, which varies according to the size of the package.

C. Q. 710. So, Mr. Zeidler, this brand which you claim, is used both on barrels and sacks, is it not?

A. It is used both on barrels and sacks. It is circular on barrels, takes a different shape on sacks.

C. Q. 711. Was this brand registered?

A. Yes, sir.

C. Q. 712. When was it registered?

A. I think it was directly after we commenced to run; I think, wasn't it?

153 C. Q. 713. Was it in 1886, Mr. Zeidler?

A. It must have been previous to 1886.

C. Q. 714. Then the Northwestern Miller of February 2d, 1889, which states your brand as having been registered in 1886, is not correct?

A. Mr. Gunckel will give you the date.

Mr. Gunckel: June 22d, 1886.

C. Q. 715. And the brand as registered, Mr. Zeidler, is the same as that advertised, is it not?

A. It is similar to that. It is the same brand as to wording, but not red and blue.

C. Q. 716. What are the colors of the advertisement which you have seen in the Northwestern Miller?

A. I think the advertisement is printed in black in the Northwestern Miller. That only refers to the brand. The brand is merely a sample brand. It is not the brand in coloring.

C. Q. 717. When did you first advertise this brand in the Northwestern Miller, Mr. Ziedler?

A. I don't remember the date.

C. Q. 718. Was it in 1886?

A. I could not tell; it could be easily ascertained from the Northwestern Miller.

(It is agreed that a statement of the Northwestern Miller as to the fact will be accepted as evidence.)

C. Q. 719. Mr. Zeidler, what other brands of patent flour have you besides the "Columbia"?

A. We use the brand "Superlative," and have used at times th brand of "Best," and some others.

C. Q. 720. "Golden Rod"?

A. "Golden Rod."

C. Q. 721. And some others?

A. And some others.

C. Q. 722. And those flours are all the same or about the same grade, are they not?

154 A. We only make one grade of patent flour.

C. Q. 723. And that one grade of patent flour you have branded with various brands, have you not?

A. Yes, sir.

C. Q. 724. When a customer buys a patent flour, if he desires it to be branded to suit himself, you do so, do you not?

A. We do at times, to limited extent. We don't make a general custom of it.

C. Q. 725. In such case, the customer furnishes brands for you, do they not?

A. In some cases.

C. Q. 726. Mr. Zeidler, have you ever seen a brand of the Columbia Mill Company of Dakota, which is called "Columbia"?

A. I have seen a brand of the Columbia Milling Company, Dakota, branded "Pride of Columbia," but not "Columbia."

C. Q. 727. You have not seen the brand which is branded "Columbia" of the Columbia Milling Company, Dakota?

A. I have not.

C. Q. 728. The only brand you ever saw was that brand, "Pride of Columbia"?

A. Yes, sir; that is the only one I have come into competition with.

C. Q. 729. Where did you see that?

A. In Omaha.

C. Q. 730. When?

A. Some years ago.

C. Q. 731. Was it spring-wheat flour?

A. It was understood to be spring-wheat flour.

C. Q. 732. The difference between spring-wheat flour and winter-wheat flour could not be told by an expert upon a mere examination of it?

155 A. I think so. I think any dealer in flour would know the difference.

C. Q. 733. I mean by looking at it without using it. Looking at the two flours, it would require an expert to tell which was spring wheat and which was winter wheat?

A. I don't know; I could not answer the question. There might be something the matter with his eyes.

C. Q. 734. How would you determine the spring wheat from the winter wheat flour?

A. By an inspection.

C. Q. 735. What would that inspection consist of?

A. In sampling the flour.

C. Q. 736. What would you do?

A. Look at them, test them, feel them.

C. Q. 737. Through what portion of the year does your mill run?

A. All the year with the exception of the holidays.

C. Q. 738. Take in 1888; can you tell us how many days in the year your mill ran?

A. In 1888 we ran very steady up to December. In 1888 I think we ran every day in the year with the exception of holidays, very near.

C. Q. 739. Did you run on Sundays?

A. Not as a rule.

C. Q. 740. How many barrels of flour did you brand a day?

A. Between fifteen and sixteen hundred.

C. Q. 741. Fifteen hundred barrels is the capacity of your mill?

A. About that; between fifteen and sixteen hundred is the capacity of a day.

156 C. Q. 742. Does your mill run to its fullest capacity every day?

A. Pretty nearly, in an ordinary year.

C. Q. 743. Can you recall how it was in 1888?

A. We ran very full in 1888.

C. Q. 744. Then you mean to say that in 1888 you ground 1,500 barrels every day?

A. We averaged pretty nearly that.

C. Q. 745. Did you average over 1,200, Mr. Zeidler?

A. I could not tell without referring to the books. The production is dependent at certain times in the year upon the water, and it might have run down to 800 barrels. The average capacity of 1,500 barrels per day may be got down in the winter to less than that amount. We ran for the crop year—from the 1st of September, 1887, to the 1st of September, 1888—we ran about 350,000 barrels.

C. Q. 746. And what portion of the flour milled was "patent" in that year?

A. About sixty per cent.

C. Q. 747. Now, can you tell me, Mr. Zeidler, how much of the flour in the year 1888, was sold by your concern to the Indians?

A. I don't think we had any direct trade among the Indians.

C. Q. 748. You know that some of your flour went to the Indians?

A. Some of it went to the United States Government.

C. Q. 749. Can you tell how much you sold to the United States?

A. I can't tell without referring to my books.

C. Q. 750. How much of your flour in 1888 was exported?

157 A. I could not give the exact figures without looking at the books.

C. Q. 751. You can get the books for us?

A. Yes, sir.

C. Q. 752. Where is your patent flour sold, Mr. Zeidler?

A. Principally in the United States.

C. Q. 753. What portion of the United States?

A. In the New England States, New York, Pennsylvania, Louisiana, South Carolina and some in the Southwestern States—pretty near all over the United States.

C. Q. 754. And who are your agents in the East, selling your flour—in the Middle and New England States?

A. In the New England States, our agent is Horace S. Wade, Boston; in New York, our agents are Grenville Perrin & Co.; in Philadelphia and Pennsylvania, Linnard & Gibbs.

C. Q. 755. Are Linnard & Gibbs your agents in Pennsylvania, your agents now?

A. No.

C. Q. 756. Who are your agents now?

A. We have a direct representative there now; our Mr. Wade sells to customers there now.

C. Q. 757. You have no resident agent there now?

A. We have several resident customers there that we sell our flour to, if you call them agents. We have, to a certain extent, resident agents, because we protect them on certain brands of flour which they handle.

C. Q. 758. Who are the resident agents you speak of now in Philadelphia, for your flour. Who are your customers in Philadelphia?

A. I will bring you a list this afternoon.

158 The witness is asked to bring the names and amounts of flour sold to them during the past year.

C. Q. 759. How much flour have you now in Philadelphia, stored?

A. I think about 2,000 barrels.

C. Q. 760. That has not been sold to anybody, has it?

A. Not the flour that is in store there at present.

C. Q. 761. Is it there for the purpose of sale?

A. Yes, sir.

C. Q. 762. Why has it not been sold?

A. Because the trade is very slow at present; the demand is very light. We are selling it right along every day.

C. Q. 763. Some of that flour, if not all of it, has been in Philadelphia for quite awhile, has it not?

A. Yes, several months.

C. Q. 764. Some of it has been there since December, has it not?

A. No, I think not.

C. Q. 765. Still, you are not certain?

A. I think all the December lots have been sold.

C. Q. 766. That which was there in December remained considerable time before being sold?

A. No, it did not.

C. Q. 767. During the past year, Mr. Ziedler, did you not have some difficulty about disposing of some four or five thousand barrels that was stored there?

A. No, we had no difficulty in disposing of it.

C. Q. 768. Did you have any difficulty about it?

A. About price?

C. Q. 769. There was at one time during the past year in Philadelphia, stored about 4,000 barrels of your flour?

159 A. I think, yes, about 4,000 barrels were shipped there. I don't remember whether it was all in store at one time.

C. Q. 770. When the flour was shipped to Philadelphia, was it shipped to purchasers or not?

A. It was shipped on storage.

C. Q. 771. Was it not originally shipped to certain parties in Philadelphia, dealers in flour?

A. It was shipped to dealers in flour for storage.

C. Q. 772. And not sold to them?

A. It was with the expectation of selling it to them.

C. Q. 773. Wasn't there some complaints made about the grade of that flour?

A. We have had no direct complaints.

C. Q. 774. And what do you know about it, or what have you heard about it, about any complaints or about the quality of the flour?

A. We have had no complaints, as I told you. We have had no direct complaint in regard to the quality of that flour. It was all sold at a good price and very profitable prices, too.

C. Q. 775. What indirect complaints have you had?

A. The indirect complaints are that certain people in Philadelphia say that some of their flour was not—was a little mitty—had a little flavor.

C. Q. 776. And wasn't it on that account, Mr. Zeidler, that it was slow to sell?

A. We asked too high a price for it because it was hard-wheat flour.

C. Q. 777. Didn't some of the complaints come from some of your customers, Brecht & Hughes, for instance?

A. Not to my knowledge. Brecht & Hughes were our agents for some of that flour. They were not agents.

160 C. Q. 778. And didn't they have trouble in selling it?

A. The price gave them trouble.

C. Q. 779. They failed to sell it?

A. No, they have sold it.

C. Q. 780. And you say that Brecht & Hughes sold that flour for you?

A. Brecht & Hughes sold some of it. In fact Brecht & Hughes sold all of the last lot of that flour that was shipped on storage.

C. Q. 781. Mr. Wade did not sell it?

A. I don't think he sold those particular lots. I think we employed Mr. Brecht as local agent for the sale of those local lots of flour.

C. Q. 782. Do you know, Mr. Zeidler, what portion of your flour branded "Columbia" has been sold in sacks, and what in barrels, wherever it has been sold?

A. A very large proportion has been sold in sacks. All export flour has been shipped in sacks.

C. Q. 783. Some of the flour has been sold in sacks in New England and Eastern States, has it not?

A. Yes, sir.

C. Q. 784. Mr. Zeidler, you know that notice had been served upon us to take the testimony of Mr. Wade and Mr. Sprague in Providence, did you not?

A. Yes, I knew it.

C. Q. 785. You knew that testimony was taken in Providence?

A. Mr. Gunckel told me; yes, sir.

C. Q. 786. Do you know whose testimony was taken there?

A. I think Mr. Wade's and Mr. Sprague's.

161 C. Q. 787. Don't you know, Mr. Zeidler, that Mr. Sprague's was not taken?

A. I don't know anything about that.

C. Q. 788. Have you not been informed, Mr. Zeidler, through Mr. Gunckel, that Mr. Sprague's testimony was not taken in Providence, and why it was not taken?

A. I think Mr. Gunckel did inform me that Mr. Sprague's testimony was not taken.

C. Q. 789. And what reason was given for not taking that testimony by Mr. Gunckel or Mr. Strawbridge?

A. Because, as I was told, that it would not do us much good.

C. Q. 790. Were you not told, Mr. Zeidler, that Mr. Sprague had been selling flour with a brand in which the word "Columbia" was used?

A. Yes, sir.

C. Q. 791. And weren't you told that Mr. Sprague had been selling such a flour with such a brand for a long period of years?

A. No, I was not told that. I understood that Mr. Sprague had been using the word "Columbia" several years ago, and had quit using it for several years; that he had been using it before we used it, and had not used it for several years, and had only used it locally.

C. Q. 792. Were you not told that he had within a year a flour made for him and branded in this section of the country?

A. No, sir; I was not. I only understood that Mr. Sprague had not used that brand for several years, but had used it locally in former years.

C. Q. 793. And you were not told that Mr. Knowles had very recently sold him a flour branded "Columbia"?

162 A. I was not.

C. Q. 794. Do you know Mr. James K. Knowles?

A. I know him by reputation.

C. Q. 795. Do you know what his business is?

A. I think he is a flour salesman.

C. Q. 796. He represents some of the mills of the Northwest, does he not?

A. I don't know which mills he represents. I know he has represented some mills; I don't know what.

C. Q. 797. You know he is located at Boston?

A. I think he was located in Boston, but I am not certain.

C. Q. 798. Can you tell us, Mr. Zeidler, how many barrels of patent flour have you sold in Philadelphia in the year 1888? And what quantity was in barrels and what in sacks?

A. Yes, by reference to the books.

C. Q. 799. How are spring-wheat flours quoted upon Eastern markets; I don't mean as to price; how are they designated?

A. They are designated as spring wheats.

C. Q. 800. Are you certain of that?

A. I think that is the usual way of designating them.

C. Q. 801. Is that the usual way of quoting them in Eastern markets?

A. It is in certain circles quoted as Minnesota patent. I don't think it is in others. They are very often quoted as Minnesota patent.

C. Q. 802. Are they not always quoted in all of the papers of Philadelphia, in the New York, Boston, Providence and the New England States as "Minnesota patent"?

A. Not to my knowledge.

163 C. Q. 803. Are you at all familiar with the quotations in the East?

A. Yes, I am doing business there.

Adjourned until 3 o'clock.

Examination continued at 3 o'clock.

C. Q. 804. Mr. Zeidler, the information you received about the testimony in Providence, was it in conversation with Mr. Gunckel?

(The witness is instructed by counsel for complainant that unless he desires he need not disclose any matters that were disclosed between him and his counsel in reference to this case.)

A. Yes, sir.

C. Q. 805. You did not receive a letter from Mr. Gunckel?

A. No, sir.

C. Q. 806. Were you not shown by Mr. Gunckel a letter from Mr. Strawbridge?

A. I was not.

C. Q. 807. Do you know, Mr. Zeidler, who makes the flour recently branded by the defendant- "Columbia patent"?

A. I understand that it is made by Sanderson, in Milwaukee.

C. Q. 808. When did you learn that?

A. Two or three weeks ago.

C. Q. 809. Who informed you of it?

A. Mr. Sanderson.

C. Q. 810. Is that the first knowledge you had of Sanderson's manufacturing that flour?

A. Well, it was the first direct and absolute knowledge that I had of it; yes, sir.

C. Q. 811. Mr. Wade says that several months ago you informed him that Sanderson made the flour; that is not so, is it?

A. It is possible that I did.

164 C. Q. 812. What information did you have of who made the flour prior to Mr. Sanderson's telling you?

A. The information I had that it was shipped by Mr. Sanderson, I received from the steamship company, or rather from the transportation company.

C. Q. 813. What transportation company?

A. I don't remember the name of the transportation company—one or the other running out of Milwaukee.

C. Q. 814. When did you get that information?

A. Several months ago. I am not certain as to the exact date.

C. Q. 815. Was it in this year?

A. It might have been this year or last year—it might have been last year.

C. Q. 816. Can you tell about the time?

A. I can't tell about the time, the exact time, some time ago, I think it was last year.

C. Q. 817. It was a long time after this suit was brought?

A. It was after this suit was brought; yes, sir.

C. Q. 818. Mr. Zeidler, what words were in your brand prior to its registration in 1886; what formed the brand which you called "Columbia" prior to 1886?

A. Same colors and wording as present brand.

C. Q. 819. Same colors as present brand?

A. Same colors.

C. Q. 820. Did you or did you not have any other forms for this brand?

A. Never had any other words, and it had the same words and colors as the present band.

C. Q. 821. Was the 350,000 which were milled in 1888 about the average production of each year?

165 A. Yes; some years were less, but no years were more. It is a fair average capacity of what the mill can do with good power and good wheat; 1888 was a good power year.

Counsel for the complainant states that it was understood between counsel, that he may enter objections at the end of the deposition, to the several questions and answers of the examination, with the same force and effect as if such objection- had been entered seriatim, and he now enters such objection to the cross-examination as being incompetent, irrelevant and immaterial, and not pertinent to the issue, and not proper cross-examination.

It is also stipulated that the deposition may be held open until the figures requested from the witness are furnished to the notary, to be inserted in the deposition.

The following is the statement offered by the witness in compliance with the request of the counsel for the defendant-:

List of customers in Philadelphia for flour:
Brecht & Hughes, 1,100 barrels.
Franklin, 400 140-lb. sacks.
Sherrick & Co., 225 bbls., 600 24½-lb. sacks.
Linnard & Gibbs, 5,100 bbls. and 250 98-lb. sacks.
R. B. Graham & Co, 300 bbls.
J. J. & C. R. Simons, 450 bbls.
J. W. Allen & Co., 450 bbls.

Sold in Philadelphia in 1888:
7,625 bbls.
400 140-lb. sacks.
250 98-lb. sacks.
2,800 24½-lb. sacks.

Sold to Government in 1888:
120,200 sacks.

166 Exported in 1888:
23,100 140-lb. sacks.
33,200 280-lb. sacks.
17,500 110½-lb. sacks.

ERNST ZEIDLER.

STATE OF MINNESOTA,
County of Hennepin, } *ss:*

I, Charles E. Churchill, a notary public in and for the State and county aforesaid, and duly commissioned and qualified under the laws of the United States to take depositions for use in the circuit courts of the United States, do hereby certify that the reason for taking the foregoing depositions is, and the fact is, that the testimony of said witness is material and necessary for the plaintiff in the cause in the caption of said deposition named, and that said witness lives and did live, at the time of taking said deposition, in the city of Minneapolis, State of Minnesota, the same being at a greater distance than one hundred miles from the city of Philadelphia, State of Pennsylvania, where the court at which it is expected the said cause will be tried, was appointed by law to be held, to wit: more than 1,250 miles therefrom.

I further certify that a notification of the time and place of taking the said deposition, signed by the complainant's solicitor, was made out and was duly served on James Alcorn, Esq., and that the said James Alcorn, Esq., attended during the taking of said deposition, and I hereto annex the said notification with proof of service endorsed thereon.

I further certify that on the 1st day of June, 1889, I was
167 attended at my office, No. 522 Temple court, in the city of
Minneapolis, State of Minnesota aforesaid, by P. H. Gunckel,

Esq., and James Alcorn, Esq., solicitors respectively for the complainant and defendants, and the witness, Ernst Zeidler, who was of sound mind and lawful age, and who was by me carefully examined and cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, and the deposition was by me reduced to writing in the presence of the witness, and from his statement, and after reading the same to the witness, he subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of sealing up and directing the same with this certificate of the reasons aforesaid for taking said depositions, and with my own hand transmitting the same to the court for which the same was taken; and I do further certify that I am not of counsel nor attorney for either of the parties in the said deposition and caption named or in any way interested in the event of the said cause named in said caption.

In testimony whereof I have hereunto set my hand and affixed my official seal this 3d day of June, 1889.

CHARLES E. CHURCHILL,
[L. S.] *Notary Public, Hennepin County, Minnesota.*

168 Circuit Court of the United States for the Eastern District of Pennsylvania.

THE COLUMBIA MILL COMPANY
vs.
WILLIAM W. ALCORN *et al.*
} In Equity.

TERRITORY OF DAKOTA,
County of Brown,
} *ss:*

Be it remembered, that on this 4th day of June, 1889, I, Isaiah Hunsberger, a notary public in and for the county and Territory aforesaid, did call and did cause to be and personally appear before me at my office in the city of Columbia and Territory aforesaid, pursuant to the notice hereto annexed and the stipulation of counsel of record in said cause, John D. Lavin, John Nelson, P. E. Taylor, George S. Hoover and Don C. McKenzie, to testify and the truth to say on the part of the complainant in the above-entitled cause.

And the said JOHN D. LAVIN, being of lawful age and having been by me cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said John D. Lavin, and he did thereupon depose, testify and say as follows:

169 Examination by P. H. GUNCKEL, counsel for complainant:

Q. 822. Please state your name, age, residence and occupation.

A. John D. Lavin; age, 41; residence, Columbia, Dakota; occupation, merchant.

Q. 823. How long have you lived in Columbia?

A. Nine years.

Q. 824. Is there a flour mill in Columbia, Dakota, and if so, what is its name, and the name of the company or corporation that has operated it?

A. There is. Columbia Milling Company.

Q. 825. When was the mill built of which you speak?

A. In 1882.

Q. 826. You may state, if you know, who were the owners and proprietors of the mill at that time?

A. F. H. Townsend, William Townsend and M. R. Baldwin.

Q. 827. Were they a copartnership or corporation at that time, and under what name?

A. They were a copartnership and under the name of F. H. Townsend & Co.

Q. 828. When was the name changed unto the Columbia Milling Company?

A. I think in 1885.

Q. 829. Are there any of the parties you name now residents of Columbia?

A. No.

Q. 830. Do you know what brands, if any, were used in the mill you speak of?

A. I do. The first brands used were "Pride of Columbia," "O. K.,"
and "XXXX," and afterwards changed, I think in the fall of 1887,
to "Columbia patent," like the sample sack which is handed
170 to the notary to be marked Complainant's Exhibit No. 1, and
a little later they adopted this form, similar to that on the
sack handed to the notary, to be marked Complainant's Exhibit
No. 2.

(Complainant offers these exhibits in evidence.)

Q. 831. What knowledge have you of the use of these brands by the mill you refer to?

A. I sold sacks of flour so branded in my store and have sold flour of their manufacture most of the time since the mill started.

Q. 832. Do you know whether the mill is now *now* — operation?

A. It is not.

JOHN D. LAVIN.

And the said JOHN D. NELSON, — of lawful age and having been by me cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the controversy aforesaid, I did carefully examine the said John D. Nelson, and he did thereupon depose, testify and say as follows:

Examined by P. H. GUNCKEL, counsel for complainant:

Q. 833. Please state your name, age, residence, and occupation.

A. John Nelson; age, 32; Columbia, Dakota; farmer and laborer.

Q. 834. Were you employed in any capacity in the Columbia Milling Company in your town?

A. I was.

Q. 835. In what capacity?

A. First year as roustabout, and two years as book-keeper and wheat-buyer.

Q. 836. What was the name of the mill company?

171 A. Columbia Milling Company.

Q. 837. From what time did it have that name?

A. From November, 1885.

Q. 838. Are you acquainted with the brands used in the mill?

A. I am.

Q. 839. What were they?

A. "Pride of Columbia," as patent flour. "O. K." for straight, and "XXXX" for bakers, were the brands used when I went in. Afterward, the patent brand was changed to read "Columbia patent," I think during the year 1887. The brand was the same as the paper sack Exhibit No. 1, and in August, 1888, was changed to the style shown in the sack Exhibit No. 2.

Q. 840. Were those brands "Pride of Columbia," and "Columbia patent," used in barrels as well as sacks?

A. No, sir.

Q. 841. Do you know whether or not the mill is still owned by the Columbia Milling Company, and whether it is in operation?

A. It is neither owned by the Columbia Milling Company, nor in operation.

Q. 842. Did the Columbia Milling Company sell it?

A. No, sir.

Q. 843. How and when was it sold?

A. It was sold under a mortgage during February, 1888.

Q. 844. Are any of the parties who were interested in the Columbia Milling Company, now residents of or in Columbia?

A. I could not say.

Q. 845. Is neither of the Townsends or Baldwin here?

172 A. I think not.

Q. 846. Is the Columbia Milling Company now engaged in milling flour?

A. They are not.

JOHN NELSON.

And the said P. E. Taylor, being of lawful age and having been by me cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said P. E. Taylor and he did thereupon depose, testify and say as follows:

Examination by P. H. Gunckel, counsel for complainant:

Q. 847. Please state your name, age, residence and occupation.

A. Pollok E. Taylor; age, 42; residence, Columbia, Dakota; occupation, attorney-at-law.

Q. 848. Do you know the property of the Columbia Milling Company in your town?

A. Am acquainted with the property recently owned by the Columbia Milling Company.

Q. 849. Did it embrace a flour mill?

A. It did.

Q. 850. Who are its present owners?

A. John Smith, Jr., and E. W. Giddings.

Q. 851. From whom and how did they acquire title, do you know?

A. I do. They acquired title by and under a sheriff's deed, issued under a mortgage foreclosure.

Q. 852. What, if any, personal knowledge have you of the proceedings of foreclosure referred to?

A. I was the attorney who acted for the mortgagees who foreclosed it.

173 Q. 853. By whom was that mortgage given and when was it foreclosed?

A. Mortgage was given by Melvin R. Baldwin, William Townsend and Freeling H. Townsend.

Q. 854. Do you know when the Columbia Milling Company was organized?

A. I do not.

Q. 855. Do you know whether or not the property covered by the mortgage which you foreclosed, embraced the mill that was for some years past operated by the Columbia Milling Company?

A. I do.

Q. 856. Has the Columbia Milling Company any interest in this mill property?

A. It has not.

Q. 857. Is it now operating the mill?

A. It is not.

Q. 858. Has it any office or place of business, or any officer or agent here or elsewhere?

A. Not to my knowledge.

Q. 859. Is there any other mill at Columbia, Dakota, aside from the one you have been speaking about?

A. There is not.

POLLOK E. TAYLOR.

And the said George S. Hoover, being of lawful age and having been by me cautioned and sworn to testify the truth, the whole truth and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said George S. Hoover, and he did thereupon depose, testify and say as follows:

Examination by P. H. Gunckel, counsel for complainant:

Q. 860. Where do you reside and what is your occupation?

174 A. I reside in Columbia, Brown county, Dakota; occupation, laborer.

Q. 861. Were you at any time employed at the mill of the Columbia Milling Company, of Columbia, Dakota?

A. Yes, sir.

Q. 862. When and what were your duties?

A. Began in the fall of 1886, and continued with them until the mill closed last fall, except about three months last summer. My duties were principally as flour-packer.

Q. 863. Are you familiar with the brands that were used in the mill?

A. Yes, sir.

Q. 864. What were they?

A. First fall they used "Pride of Columbia" for patent flour, and changed some time in the fall of 1886 to "Columbia patent." The other brands were "O. K." and "XXXX."

Q. 865. I show you the brands on the sacks marked respectively Exhibits No. 1 and No. 2, and ask you whether or not they are such as were used by the Columbia Milling Company?

A. Yes, they are such as were used after they changed from "Pride of Columbia."

Q. 866. Please describe the brand of "Pride of Columbia" as you state.

A. Well, there was a difference between the brand Exhibit No. 1, only in the former having "Pride of Columbia" occupying the space that the word "Columbia" occupies in Exhibit No. 1, otherwise they were just the same.

Q. 867. Is the Columbia Milling Company still making flour?

A. No, sir.

175 Q. 868. Were you in their employ from 1886, down to the time the mill ceased running?

A. With the exception of about three months in the summer of 1888, but I was with them when they stopped running.

Q. 869. Are any of the officers or agents of the Columbia Milling Company now at this place?

A. Not to my knowledge.

Q. 870. Were the brands you speak of used upon barrels while you were in the mill?

A. No, sir; we used no barrels.

Q. 871. Do you know how much the mill's capacity was, and what its manufacture was during the time you were there?

A. Its capacity was 135 barrels in 24 hours; and I do not know how much was made while I was there.

GEORGE S. HOOVER.

And the said DON C. MCKENZIE, being of lawful age and having been by me cautioned and sworn to testify the truth, the whole truth and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said Don C. McKenzie, and he did thereupon depose, testify and say as follows:

Examination by P. H. GUNCKEL, counsel for complainant:

Q. 872. State your name, residence and occupation.

A. Don C. McKenzie; reside in Columbia, Dakota; occupation, a banker.

Q. 873. How long have you resided in Columbia?

A. Ten years.

Q. 874. Do you know of a mill in your city recently owned by the Columbia Milling Company?

A. I do.

176 Q. 875. Do you know when it was built, by whom, and by whom operated?

A. 1882. By F. H. Townsend and others, and first operated by them as partners.

Q. 876. What, if any, connection had you at any time with the Columbia Milling Company?

A. I was a book-keeper for the company during the summer of 1887. The company was grinding under a contract with Charles A. Baker, and I was employed as a book-keeper in the interest of Baker.

Q. 877. Do you know the managers, officers or directors of that corporation, and if so, whether any of them are now residents of this city?

A. I know some of the parties in interest, and that none are residents of Dakota. Mr. F. H. Townsend was manager during the entire time the mill was run.

Q. 878. Do you know what brands were used for the flour made by the mill referred to?

A. The "Columbia patent," as shown in Exhibit No. 1, and style of brand as shown in No. 2, was adopted a little later. The former was adopted about the 1st of October, 1887, and previous to that they used same style as in No. 1, except that "Pride of Columbia" was used in place of the word "Columbia."

Q. 879. Where was the trade for the flour so branded?

A. About three-fourths of it was sold in Columbia and surrounding towns in Dakota.

Q. 880. Do you know whether or not the mill is now or has recently been in operation?

A. It is not now in operation, and has not been for the past several months.

Q. 881. Do you know whether the Columbia Milling Company still owns the mill?

177 A. I believe not. I know it has been sold under first mortgage and the mortgagees are in possession.

DON. C. McKENZIE.

TERRITORY OF DAKOTA, } ss:
County of Brown, }

I, Isaiah Hunsberger, a notary public in and for the county and Territory aforesaid, do hereby certify that the reason for taking the foregoing depositions is, and the fact is, that the testimony of said witnesses is material and necessary for the plaintiff in the cause in the caption of said depositions named, and that all of the said witnesses live and did live at the time of the taking of depositions in the city of Columbia, Brown county, Dakota, the same being at a greater distance than one hundred miles from the city of Philadelphia, Pennsylvania, where the court at which it is expected the said cause will be tried was appointed to be held, to wit: more than 1,500 miles therefrom.

I further certify that a notification of the time and place of the taking of said deposition-, signed by the complainant's solicitor, was made out and served on defendants' solicitor on the 15th day of May, 1889, as appears from the notice hereto attached.

And I further certify that I received from the defendants' solicitor the letter dated May 29, 1889, which letter I hereto annex.

I further certify that on the 4th day of June, 1889, I was attended at my office, in the city of Columbia, Brown county, Dakota, by P. H. Gunckel, solicitor for the complainant, and the witnesses, John D. Lavin, John Nelson, Pollok E. Taylor, George S. Hoover 178 and Don C. McKenzie, who were of sound mind and lawful age, and the witnesses were by me carefully examined, cautioned and sworn to testify the truth, the whole truth and nothing but the truth, and the depositions were by me reduced to writing in the presence of the witnesses and from their statements, and after carefully reading the same to the witnesses they subscribed the same in my presence.

I further certify that I am not of counsel or attorney for either of the parties in said depositions or caption named, or in any way interested in the event of this cause.

I have retained the said depositions in my possession for the purpose of sealing up and directing the same with this certificate of the reasons aforesaid, for taking the said depositions to the court for which the same were taken.

In testimony whereof I have hereunto set my hand and affixed my official seal the 4th day of June, 1889.

ISAIAH HUNSBERGER,
[SEAL.] *Notary Public.*

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179 MILWAUKEE, *May 29th*, 1889.

COLUMBIA MILL COMPANY OF MINNEAPOLIS
vs.
ALCORN.

I. Hunsberger, Esq., Columbia, Brown county, Dak.

DEAR SIR: I received notice of the taking of the testimony before you in the case on behalf of the complainant on Tuesday next, June 4th. Fearing I may not be present at the examination, will you please note for me an objection to the testimony generally.

Very truly yours, JAMES ALCORN,
Att'y for Defendant.

180 *Carrol Affidavit.*

Circuit Court of the United States for the Eastern District of Pennsylvania.

STATE OF NEW JERSEY:

COLUMBIA MILL COMPANY
vs.
WM. W. ALCORN and SAMUEL ALCORN. } In Equity.

STATE OF NEW JERSEY,
County of Essex, } *ss:*

James Carrol, being first duly sworn, deposes and says that he is fifty-five years of age, resides in the town of Irvington, N. J., and is engaged in the flour and feed business, and has been so engaged at Newark, N. J., for nearly thirty years past; that he has heretofore at different times purchased flour of the firm of W. W. Alcorn & Company, of Philadelphia, the said defendants; that about the month of November, 1887, he purchased from said firm through one of the said defendants, who called at his establishment, a car-load, to wit, one hundred and fifty barrels of flour, the same being sold to him by the defendants as "Columbia" flour; that on
181 or about the 1st of December following the flour so purchased was so delivered to him by the said defendant-, and deponent thereafter sold the said flour to his customers, to wit: grocers, bakers and private families within and about said city of Newark, and the said flour, so far as deponent has been advised, proved to be a satisfactory flour; that thereupon, at the solicitation of said defendants, deponent purchased a second car-load of said "Columbia" flour from defendant-, and the same was delivered to him on or about the 10th day of March, 1888; that he thereafter sold a portion of said second car-load of flour to his customers, to wit: grocers, bakers and private families, and that nearly all of the flour so sold by him has been returned to him as being of inferior quality and unsatisfactory to the consumers; and he still has on hand seventy-five or a hundred barrels thereof and is not able to sell the same except to bakers; that before learning of the inferior quality of said second car-load of flour, he ordered from defendants, at their solicitation, a third car-load of said Columbia flour, but that, because of the inferiority of said second lot of said flour, he has refused to accept the flour, shipped to him under said last order. Deponent says that the flour so sold as aforesaid to him by the defendants was represented and designated by them as "Columbia" flour; and that all of the flour received by him from them as aforesaid bore the brand stenciled on the head of each barrel as follows: The words "high grade" forming the upper arc of the circle, and beneath it the words and figure "No. 1 hard wheat," on horizontal line, the word- "Minneapolis, Minn." forming the lower arc of the circle, and the word "Columbia" in prominent letters across the middle of the word "patent;"

and that all of the said words were in black stenciled upon 182 the heads in the usual manner and occupied the larger portion of the barrel head as is usual in branding flour. And deponent further says that in selling the said flour to his customers he has designated the same simply as "Columbia" flour without any representation of its origin or place of manufacture, and has so offered for sale and sold the same as such flour in the usual manner of selling flour in and about said city of Newark.

183 Circuit Court of the United States for the Eastern District of Pennsylvania.

THE COLUMBIA MILL COMPANY
vs.
WILLIAM W. ALCORN *et al.*
} In Equity.

Stipulation.

It is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled cause, that the time for taking proofs in rebuttal by the complainant be and the same is hereby extended to June 20th, 1889.

That the time for taking testimony at the following-named places before the officers heretofore named in the notices served upon defendants on the 15th day of May, 1889, be and they are hereby fixed as follows:

At Oakland City, Indiana, on the 28th day of May, 1889; at Milwaukee, Wisconsin, on the 29th day of May, 1889; at Minneapolis, Minnesota, on the 1st day of June, 1889; and at Columbia, South Dakota, on the 4th day of June, 1889.

That testimony on behalf of the complainant may be taken in Providence, Rhode Island, on the 18th day of May, 1889.

J. ALCORN,
Att'y for Respondents.

Philadelphia, May 17th, 1889.

184 KLENCK'S EXHIBIT "B."

OAKLAND CITY, INDIANA, 5, 7, '88.

W. W. Alcorn, Esq.:

We do not. Our brands are Crown, Advance, Bakers' Delight, and Pride of Columbia.

COLUMBIA MILL COMPANY.

KLENCK'S EXHIBIT "C."

PHILADELPHIA, *May* 3*d*, 1888.

Columbia Mill Company, Oakland City, Gibson county, Indiana.

GENTLEMEN: You would do il l sou wou mail the month and year your mill was started. There is another mill of the same name which claims to be first and only mill of that name in this country.

Very truly, W. W. ALCORN & CO.

KLENCK'S EXHIBIT "D."

PHILADELPHIA, *May* 23, 1889.

THE COLUMBIA MILL COMPANY
vs.
WILLIAM W. ALCORN & CO.

Messrs. George A. and Fred. J. Klenck, Oakland City, Indiana.

DEAR SIRS: I have received notice from P. H. Gunckel, 185 Esq., solicitor for the Columbia Mill Company, of Minneapolis, that on the 28th inst., at 10 a. m., you will be examined on their behalf, before David M. Martin, Esq., a notary public of Oakland City. The suit was brought against William W. Alcorn & Co., claiming that they infringed the right of the Columbia Mill Company, of Minneapolis, to the word "Columbia" as a brand of flour. In our testimony we stated that there were other mills of the name "Columbia" having brands with the word "Columbia" as a part, and among others we referred to your company. We did so upon the authority of the letter written by you May 5th, 1888, of which the following is a copy:

OAKLAND CITY, INDIANA, *May* 5, 1888.

Messrs. Wm. W. Alcorn & Co., Philadelphia, Pa.

DEAR SIRS: Your letter of the third at hand, and duly noted. We are not claiming any distinction for being the first mill in this country under that name, as we named the mill after the township it is in. We started this mill up in August, 1881, and we never asked if other mills were named the same. There are two we know of, one at Minneapolis and one at Detroit.

We are yours truly, COLUMBIA MILL COMPANY,
(Per K.)

The complainants are now taking testimony to refute our statements, and I understand you are to be called for the purpose. It is my desire to be in Oakland City at the taking of the testimony, but it is very probable that I may not be able to get there. 186 I merely write to inform you of the nature of the proceedings.

Yours very truly, JAMES ALCORN,
Attorney for W. W. Alcorn & Co.

PHILADELPHIA, *May* 23, 1889.

COLUMBIA MILL COMPANY
vs.
WILLIAM W. ALCORN & Co.

David M. Martin, Esq., Oakland City, Indiana.

DEAR SIR: I have been notified by P. H. Gunckel, Esq., of Minneapolis, solicitor for the complainant in the above case, that testimony will be taken on their part before you on May 28th, at 10 a. m. The notice says that George A. and Frederick J. Klenck will be examined.

I desire in the event of my being unable to reach Oakland City to have you note my objection to the *the* testimony. I do this so as to be in a position to take advantage of any objectionable question.

Yours very truly,
JAMES ALCORN,
Att'y for Wm. W. Alcorn.

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187 COLUMBIA MILL COMPANY
vs.
WILLIAM W. ALCORN & COMPANY.

STATE OF PENNSYLVANIA,
City and County of Philadelphia, } *ss:*

Testimony on the part of the respondent-, taken before me, Edward E. Nicholas, notary public, in and for the county and State aforesaid and special examiner in the above-entitled cause by the agreement of the parties hereto, at the office of James Alcorn, Esq., No. 223 South Sixth street, in the said city of Philadelphia, on Thursday, December 27, 1888, and on the following days:

Friday, December 28, 1888, Thursday, January 3, 1889, Tuesday, January 15, 1889, Thursday, January 17, 1889, to which adjournments were had and I do hereby certify that there was present at each of the meetings, William C. Strawbridge, Esq., counsel for complainants, James Alcorn, Esq., counsel for respondents and the following:

Witnesses: John J. Pyle, William E. Webster, George D. Hilton, Charles C. Norris, William T. Brook, Charles Otto Schwarz, Albert A. Keene, Charles Dunwoody, Alexander Henderson, Jacob A. Maier, J. Westley Supplee, James A. Allen, Samuel Alcorn, who were sworn or affirmed by me and their testimony, by agreement of the parties, was stenographically taken and afterwards having been typewritten, was read by the said parties and their names subscribed thereto in my presence and the testimony as adduced by me is attached hereto.

EDWARD E. NICHOLAS,
Notary Public.

188 JOHN J. PYLE, a witness sworn on behalf of respondents, deposes and says:

Direct examination.

By Mr. ALCORN:

Q. 1. What is your business?
A. I am now engaged in baking at Eighteenth and Barker streets.
Q. 2. What is the name of the bakery?
A. The Pyle-Knadler Baking Company, formerly known as D. B. Fuller & Company.
Q. 3. Mr. Pyle, when did you take charge of the bakery on Eighteenth street?
A. I have only been there about two months.
Q. 4. Prior to that time, where did you live?
A. I spent most of my life in West Chester, in the confectionery and bread-baking business.
Q. 5. About how long were you in business in West Chester?
A. About 35 years.

(The brand of the complainants, as set forth in their bill, and the brand of the respondents shown witness.)

Q. 6. Will you look at those two brands and please tell us whether, in your opinion, those brands are alike or in any way similar?
A. No. I see no similarity at all; there is not similarity enough to deceive a purchaser of flour.

By Mr. STRAWBRIDGE:

Q. 7. Why have you called this witness?

By Mr. ALCORN:

A. I want to show by this witness that the two brands of flour are not similar and that nobody would be deceived thereby and that the words, Minneapolis, Minn., are for the purpose of designating a certain flour.
Q. 8. Would you be deceived in taking the brand of the respondents for the brand of the complainants?
A. With my experience, I certainly would not.
189 Q. 9. In your opinion, could any person or dealer be deceived to buy one of those brands if they intended to buy the other?
A. That is going a little too far. I would not like to say.
Q. 10. On both of these brands are the words "Minneapolis, Minn.," what do you understand by these words being upon the head of a barrel?
A. I have always understood that "Minneapolis, Minnesota" designated spring-wheat flour in contradistinction to winter-wheat flour.

Q. 11. Does it follow from the words "Minneapolis, Minn." being on the barrel head that the place of manufacture is designated?

A. No, sir; it designates spring-wheat flour.

Q. 12. Witness is shown a brand similar to the respondents, excepting in the place of the words "Minneapolis, Minn." are the words "St. Louis, Missouri," and is asked what he understands by a barrel of that character?

(Objected to, as being incompetent and irrelevant.)

A. A general form for winter-wheat flour, Minneapolis spring-wheat and St. Louis winter-wheat flour.

Cross-examination.

By Mr. Strawbridge:

X Q. 13. You consider yourself an expert in flours, do you not?

A. I think I am a pretty good judge of flours.

X Q. 14. You have been accustomed in your business to use various flours of many kinds for a great many years, have you not?

A. Oh, yes; all my life.

X Q. 15. Are you accustomed to examine the parcels or packages in which you have bought your flour?

A. No, sir.

X Q. 16. Do you buy your flour without an examination of the package or without regard to the kind or quality or the source from which it comes?

190 A. We never examine packages, it would be impossible.

X Q. 17. Then in buying flour you have been guided by the marks or symbols on the packages?

A. We buy it by the brand and depend upon the quality.

X Q. 18. And that has been the principal guide as to the flour you are purchasing?

A. There would be no other that I know of.

X Q. 19. Then you would necessarily give close attention and close examination to the brand?

A. I said I would never look at it, I have bought many a dozen cars of flour and never looked at the brands.

X Q. 20. When the goods are delivered to you do you not examine the brands and markings upon the packages to see if they have delivered the same as you bought?

A. No, sir; not one time in twenty.

X Q. 21. And you do not examine the flour itself?

A. We do not examine the flour, we go on the reputation of the flour.

X Q. 22. Then the first intimation you have of having bought bad flour is the discovery that you have produced out of it bad cakes?

A. Yes, sir; reported from the workmen; as long as our goods are good we believe the flour to be all right.

X Q. 23. Having purchased a flour which turns out to be good when you again purchase it you indicate what you desire to purchase by the brand or marks upon the packages, do you not?

A. Certainly; no other way.

X Q. 24. And if you had delivered to you a flour which did not have such marks or brands, you would then know that you had not received that which you had purchased?

A. Yes, sir; if it was some other brand.

X Q. 25. You make such an examination of the brands sufficiently often to set your mind at rest as to the flour you were receiving?

A. The flour is generally bought upon its reputation. If you
191 want a car of Imperial you say a car of Imperial; you could
not stand there and watch them as they take it off the wagons
to see that you got the brand you ordered; you could not do it.

X Q. 26. It is a fact, is it not, that when you have made up your mind that you desire to purchase a flour of a certain brand with which you are acquainted, that you some time or other examine the brand of the flour delivered to you to see that you have received the brand which you have purchased?

A. We do sometimes, if the goods turn out bad.

X Q. 27. Are you acquainted with the flour sold by the defendants in this case upon which the brand "high grade No. 1, spring hard wheat, Columbia patent, Minneapolis, Minn."?

A. No, sir; I do not think I have ever used it.

X Q. 28. Have you any certain personal knowledge as to whether that flour was and is made from winter or spring wheat?

A. None but the brand that would be on the barrel; but I have never known of a case where Minneapolis was marked on winter wheat in all my experience.

X Q. 29. It is so, is it not, that all wheat flour made in Minneapolis is made from spring wheat?

A. I believe so.

X Q. 30. And this is true of flour made in a great many other Western States, is it not?

A. Yes, sir.

X Q. 31. The fact that you understand that the flour which is branded "Minneapolis" is made from spring wheat may be due to the fact that all flour made in Minneapolis is made from spring wheat, may it not?

A. I never understood that all the flour marked "Minneapolis" came from that city. I think that all the flour made in Minneapolis is made from spring wheat.

X Q. 32. What is the difference between the spring-wheat and the winter-wheat flour?

A. I do not believe I am hardly competent to answer that, Mr. Strawbridge; I do not believe that I am sufficiently familiar with flour to answer that.

192 X Q. 33. If it should turn out that the flour you should buy with the label "Minneapolis" on it was made from winter wheat would you consider that you would have been deceived in the purchase?

A. Yes, sir; the price would fix that.

X Q. 33½. And you would consider that that would have been a fraud on you?

A. As far as the price goes; you pay more for spring wheat than you do for winter; the quality may be as good, but you can get winter cheaper.

X Q. 34. Is it a fact that the flour made from spring wheat is any better than that made from winter wheat?

A. Yes; it *it* is considered a finer wheat; it always brings more money.

X Q. 35. Have you any personal knowledge of the use of the flour made by the complainants, the brand of which you have examined?

A. My best recollection is that we have never used that brand; I do not think we did; if we did, I have no recollection of it now.

X Q. 36. Have you purchased flour of any kind from the defendants in this suit?

A. Oh, yes.

X Q. 37. Are you now a customer of the respondents?

A. We are dealing with the house all the time, and have been for many years.

X Q. 38. From all you have said I gather the fact that you consider yourself to be an expert judge of flours, is that so?

A. I do not think I am a thorough expert; I do not think I am as good an expert as those who make the bread; I have never made a loaf of bread in my life. I do not think I am a thorough expert; I have never considered myself so.

X Q. 39. Do you think that your experience in the purchase of flour has lead you to be careful and critical, in fact expert in the reading of flour brands?

A. Unquestionably I have always been particular to buy good flour; our trade requires it.

193 X Q. 40. What do you understand the meaning of the figures "196" on the head of that barrel to be?

A. Supposed to be the number of pounds of flour in the barrel; all barrels have that on.

X Q. 41. What do you understand the word "Columbia" in red letters on the head of complainants' barrel, which you have examined, to signify?

A. The location of the mill.

X Q. 42. Don't you think you have taken pains in your answer to the last question to avoid the question?

A. I have given you my understanding of it that it is in reference to the location of the mill. Columbia Mill Company's Columbia; there is no similarity between them in the least.

X Q. 43. Do you still insist in saying that you understand the word "Columbia" on the complainants' barrel head to mean the location of the mill?

A. That is what I understand it to mean.

X Q. 44. What do you understand the words "Columbia Mill Company" in blue letters on the head of the complainants' barrel to mean?

A. The name of the firm manufacturing the flour.

X Q. 45. You do not understand the word "Columbia" in red letters to mean the brand of flour?

A. Positively no; I may be wrong.

X Q. 46. Please tell me what word or words on the head of complainants' barrel you do understand to indicate the brand of the flour?

A. The whole thing designates the brand of flour.

X Q. 47. Does that include every word upon the barrel?

A. Let me answer, if I was going to order 1,000 barrels of complainants' flour I would say give me 1,000 barrels of Columbia Mill Company's Columbia. If I was going to order 1,000 barrels of the other, I would order 1,000 barrels of Columbia patent; there is no similarity at all as far as I can see.

194 X Q. 48. Will you please read from the head of complainants' barrel which you have referred to and which I now show you the word or words which indicate the name of the flour contained in that barrel.

A. I would take the whole brand, Columbia Mill Company's flour.

X Q. 49. That is you would read to the examiner the whole thing?

A. I do not understand you.

X Q. 50. (Question repeated.)

A. Yes, sir; I would designate the flour in that way.

X Q. 51. If you wished to order the special flour referred to by the letters on the head of the complainants' barrel you would simply order Columbia Mill Company's flour, would you, even though the complainants should make and sell a great number of other brands of flour of different kind or quality?

A. I don't understand your question. If I wanted that flour I would simply say that I wanted the Columbia flour.

X Q. 52. And that is what you would say to the defendants if you wanted the flour which comes in the barrel the head of which you have heretofore referred to, is it not?

A. No, I wouldn't; I would say I wanted Columbia patent; it is marked "Columbia patent," and that is marked "Columbia;" I wouldn't be deceived in the brands, that is sure.

X Q. 53. Now, as the word "patent" is written below the word "Columbia," in red letters on complainants' barrel, would you not also in ordering complainants' flour say that you wanted Columbia patent?

A. I would never take that flour for this. I tell you how I think I would work that, I would order whichever flour I liked best. I would say I want that Columbia patent black brand. I would not be deceived, I know, if there was a difference in color. I certainly would distinguish what I wanted.

X Q. 54. And would you do that in reference to the color of the letters?

A. I certainly would if the flour was the same.

X Q. 55. In that case you would ask for what flour?

195 A. Whichever was the best.

X Q. 56. Suppose the flour in the complainants' barrel to be of the same quality as that in the defendants' barrel?

A. Then they would be received without any question and used up, and the question as to whether they were the same flour would never come into my mind.

X Q. 57. And in ordering either of the said flours you would simply without mention of the color of the letters say you wanted Columbia patent?

A. If they were the same in quality; but if one was better than the other I would simply say I wanted the black brand.

X Q. 58. If you did not know which flour was the best you would not care which flour you got?

A. If they were both equal I would not care whether they were marked at all or not. I have received many a car that had no mark, but if one is better than the other I would unquestionably order the best of the two and discern by the color of the brand. To the consumer the brand is not very important if the flour is the same inside.

X Q. 59. But when the consumer is not sure that the flour inside is all right he has to buy by the reputation of the brand—by the reputation the flour has on the market?

A. No other way to do it.

X Q. 60. Then your opinion, I believe, is that the words "Minneapolis, Minn.," mean the same thing on both the complainants' barrel and the defendants' barrel—is that so?

A. Yes, sir; that is my opinion.

(Complainants' counsel objects to the testimony of the witness so far as it relates to the identity or similarity of the marks upon the complainants' and the defendants' barrels, in view of the fact that the witness has been shown not to be such a person as is competent under the law to testify as to these facts.)

196 WILLIAM E. WEBSTER, a witness sworn on behalf of respondents, deposes and says:

Direct examination.

By Mr. ALCORN:

Q. 1. Where do you reside?

A. I am in Philadelphia at present, at the Continental hotel.

Q. 2. What is your business?

A. I am a flour representative for the Winona Mill Company.

Q. 3. You sell their flour in the East here?

A. Through the United States.

Q. 4. How long have you been in that business?

A. I have been in the flour business about nine years.

Q. 5. How long have you been selling for the Winona Company?

A. Three years and a little over; about three years.

Q. 6. Are you acquainted and familiar with the various qualities and brands of flour?

A. Of Minnesota I am.

Q. 7. What do we understand you to mean by Minneapolis and Minnesota as a flour manufacture?

A. Exclusively spring wheat.

Q. 8. Where are such flours usually made?

A. The great headquarters for such flours is Minneapolis, but they are made through Minnesota and Dakota.

Q. 9. You are constantly selling flour?

A. That is my business entirely.

Q. 10. Do you mix the flours or sample them ?

A. I don't know what you mean.

Q. 11. Do you understand the sampling of flours ?

A. Yes, sir.

Q. 12. (The brand of the complainants and of the respondents mentioned in this case shown witness, and he is asked whether, in his opinion, these two brands are similar.)

A. I do not consider them similar at all.

197 Q. 13. What is the usual form of branding the flour—I mean as to the shape; is there any stipulated shape?

A. Stencil.

Q. 14. What is the general form or shape of the brand ?

A. Generally a round stencil put on the head of the barrel.

Q. 15. Would you be deceived by the brand of the respondents if you desired to purchase the brand of the complainants?

A. The words Columbia Mill Company would entirely set at rest any similarity between the two brands as regards any infringement.

Q. 16. Do you think that purchasers of flour would be deceived ?

A. That is a question I could not answer, I am not a purchaser, but, in my opinion, I should think not.

Q. 17. You would not be deceived yourself?

A. No, sir.

Q. 18. The words " Minneapolis, Minn." in a brand of flour, what do they mean ?

A. Minneapolis being the great headquarters of the manufacture of spring-wheat flour it simply signifies that the flour is of spring wheat, but it does not signify that it is made in Minneapolis. It is like St. Louis being the great headquarters of winter wheat. A large proportion of the winter-wheat flour made in Indiana and Illinois is marked St. Louis.

Q. 19. The Winona Mill Company, do they use winter wheat ?

A. Not to my present knowledge.

Q. 20. Do you know the flour of the Columbia Mill Company ?

A. I do, sir.

Q 21. Do you know anything of the flour marked " Columbia patent " ?

A. No, sir; I have never seen any of their goods, I know these goods by being in constant competition with them.

198 Cross-examined.

By Mr. STRAWBRIDGE:

X Q. 22. What words upon the head of the defendants' barrel indicate the name of the flour contained therein?

A. I do not understand your question.

X Q. 23. (Question repeated.)

A. Minneapolis, Minn., indicate that it is a hard spring wheat.

X Q. 24. (Question repeated.)

A. Any word or words contained thereon simply a spring-wheat flour under the brand of Columbia patent.

X Q. 25. Then the name of the flour contained in that barrel is Columbia?

A. The brand of it is Columbia patent, not Columbia.

X Q. 26. What does the word Columbia in red letters upon the head of the complainants' barrel mean?

A. It means that the Columbia Mill Company manufacture a brand of flour which they brand Columbia.

X Q. 27. How do you extract from the single word Columbia the information which you have given in your last answer that the flour was made by the Columbia Mill Company?

A. I don't know.

X Q. 28. What does the word patent under the word Columbia on the complainants' barrel head mean?

A. Patent is a word that signifies percentage, a percentage of patent taken off when we manufacture the flour; it is always manufactured under percentage.

X Q. 29. The word patent under the word Columbia on the defendants' barrel head means the same thing as the word patent under the word Columbia on the complainants' barrel head, does it not?

A. No, sir.

X Q. 30. Why not?

A. Because the barrel head of the Columbia Mill Company, or the complainant, signifies that it is not Columbia patent but 199 is Columbia and is a patent, what I mean by that is that they are entirely different. When a man would call for that brand he would say I want a certain amount of Columbia Mill Company's Columbia, and a certain amount of the other would be called Columbia patent. The looks of the two barrels is entirely different. The words Minneapolis, Minn., on the defendants' barrel head mean the same thing as they do upon the complainants' barrel head, that is, they signify spring-wheat flour.

X Q. 31. If you should buy flour marked as the defendants' barrel head and it should turn out not to have been made from spring wheat, would you consider that you had been deceived?

A. I should.

X Q. 32. By whom would you say the flour contained in the barrel of the defendants was made?

A. I could not say.

X Q. 33. By whom would you say that the flour contained in the barrel having the complainants' barrel head was made?

A. By the Columbia Mill Company.

X Q. 34. There are no words upon the defendants' barrel head to indicate that the flour contained in said barrel was not made by the Columbia Mill Company, are there?

A. No, sir.

X Q. 35. If, therefore, you should draw any inference from the words contained upon the head of the defendants' barrel as to the manufacturers of the flour therein.contained from the words contained thereon it would be that it had been made by the Columbia Mill Company, would it not?

A. Not at all.

X Q. 36. That inference would be the most likely one to draw, would it not?

A. It would be the furthest from a man's mind that understood the business, for the simple reason that the Columbia Mill Company would not be foolish enough to put out a brand outside of their regular established brand that contained whatever any similarity to their established brand; the custom is either to put the flour under their established brands or else under blank heads.

200 X Q. 37. If the word Columbia is the established brand of the Columbia Mill Company, that established brand is upon the head of the defendants' barrel, is it not?

A. No, sir; the Columbia patent; but the idea is "Columbia Mill Company's Columbia" is one flour, anybody can use the word Columbia. The word "Columbia" is used by the Columbia Mill Company as their brand; the use of the word Columbia patent, in my opinion, is no infringement upon the word Columbia.

X Q. 38. You are aware that the word patent is used beneath the word Columbia on the complainants' barrel, are you not?

A. Yes, sir; I am.

X Q. 39. What brands of flour do you sell?

A. I sell Laurel, Pinnacle, Snow Drift, Eclipse, Winona Bell, Northern Light, and Barnum's Jumbo. Those are the principal ones I sell now; we have about 500 stencils.

X Q. 40. The names you have given are the names of the brands you sell?

A. Yes, sir.

X Q. 41. In the case of the brand of flour known as "Laurel" what are the words contained upon the barrel head?

A. "Winona Mill Company" are in a circle at the top of the barrel head, and under that come the figures "196," then under said figures comes the word "Laurel," under that the words "fancy patent," under that "Winona, Minn." in a circle at the bottom.

X Q. 42. What kind of wheat is that flour made of?

A. Hard No. 1 Dakota fife wheat.

X Q. 43. Is that spring wheat?

A. Yes, sir.

X Q. 44. Please tell me how the flour termed "Pinnacle" is branded upon the head of the barrel in which it is contained.

A. At the top of the barrel head are the words "Winona Mill
Co.;" under these words the figures "196," under these fig-
201 ures the word "Pinnacle," under this word the word "pat-
ent," and under the word "patent" the words "Winona,
Minn."

X Q. 45. Now tell me how the flour you call "Eclipse" is branded upon the head of the barrel.

A. At the top of the head the word "Winona," under this word "196," under that "Eclipse," under that "Winona, Minn."

X Q. 46. In the case of the flour you call "Winona Bell," how is the head of the barrel labeled?

A. "Winona Mill Company," under those words the figures "196," under these figures the words "Winona Bell," under these the words "fancy straight," under these words the words "Winona, Minn."

X Q. 47. Is it true that in the other brands you have mentioned the style of the stencil is the same as the style you have described above, that is at the head of the barrel the words "Winona Mill Company," under the words the figures "196," under those figures one or the other of the brands you have mentioned, and under that brand the name of the quality or grade of the flour, and under those words the words "Winona, Minn"?

A. Yes, sir.

X Q. 48. Is it true that all of these flours are made from spring wheat?

A. Every one of them; yes, sir.

X Q. 49. Are you acquainted with any other brands of Minneapolis mills beside the Winona Company?

A. I am.

X Q. 50. Are you sufficiently acquainted with them to give me the words and figures which are stenciled upon the barrels in which these flours are contained?

A. No, I don't believe I could correctly give you what is stenciled upon them. Some have "196" at the top, and some at the bottom, and a few other little irregularities.

X Q. 51. What Minneapolis mill other than the Winona mill are you most familiar with the brands of?

A. That is hard to say any particular one.

202 X Q. 52. Just give me any one of them.

A. Porter Mill Company I am as familiar with as with any.

X Q. 53. What brands do they use?

A. Porter's XXXX, Boss Standard, Strong Bakers.

X Q. 54. Please tell me the words on either one of the brands which you have just mentioned, that are contained upon the heads of the barrels in which those brands of flour are packed.

A. I could not tell you that; I do not know. As near as I can remember, at the top of the head, "L. C. Porter Milling Company," then comes "XXXX," then under these letters the word "Boss," then under that word the figures "196," under those figures "Winona, Minn."

X Q. 55. Please give me the name of some other mill in Minnesota, not situated in the town of Winona with the brands of flour of which you are acquainted.

A. Washburn, Martin & Company.

X Q. 56. Are you acquainted with the brand of any flour manufactured in Minnesota, other than those you have mentioned, as being in Winona, Minn.?

A. Yes, sir.

X Q. 57. Which?

A. Charles Espenschield, Hastings, Minn.

X Q. 58. Can you give me the names of two of the brands of that firm?

A. I cannot give you two. Their principal brand is "Axa."

X Q. 59. Please tell me how the barrel heads are marked that that comes in.

A. They are marked similar to those I have mentioned. At the top of the head are the words, "Espenschield's," under that the word, "Axa," I cannot say whether the word "patent" is under that or not; under that comes, "Hastings, Minn." These are all the marks I can remember as being contained on that barrel.

X Q. 60. Is that flour made from spring wheat?

A. Yes, sir.

203 X Q. 61. Can you give me the name of any other milling company, not situated in Winona, Minn., or Hastings, with the brands of flour of which you have any familiarity?

A. R. D. Hubbard, Mankato, Minn.

X Q. 62. Please give me the name of one of their brands.

A. "Hubbard's Superlative."

X Q. 63. Please give me the words contained on the barrel head in which that flour is packed, as near as you can remember them.

A. It is the same as those I have mentioned, changing the name of the brand and the location of the mills. In other words, instead of "Winona," would be the words, "Mankato, Minn."

X Q. 64. Was that flour made from spring wheat?

A. Yes, sir.

X Q. 65. Is it the usual custom of flour mills in Minnesota and also in Dakota, of labeling the flour with the name of the place at which the mill is situated?

A. A great deal of the flour sent in is sent with no brand at all and is branded at this end, but it is customary with most all of the mills sending out flour under their own brands to mark them with the name of the mill in full, or the firm, and also with the name of the town wherein the mill is located.

X Q. 66. Do you think your experience as a salesman of flour, and your interest in that business, has led you, or caused you, to particularly notice any slight difference which might exist between the brands or marks upon the heads of barrels containing flour?

A. It is generally supposed that flour salesmen know the mill brands of all the leading mills, and that when we see a brand under the brand of a mill, that they are not subjected to such examination by us as are the blank heads.

X Q. 67. In other words, a salesman of your experience in the flour business, would be quick to see and note the difference between flour brands?

A. Yes, sir.

204 X Q. 68. And your business would naturally keep you on a sharp lookout in that direction?

A. Yes, sir; all principal mills, when they send goods out on a brand, are bound by the reputation of that brand to sustain that reputation by putting goods of standard uniform quality under the said brand; therefore, when we see an established mill brand we do not give it the close examination that we do goods under blank heads.

(Counsel for the complainants objects to so much of the testimony of this witness as relates to the identity or similarity of the complainants' brand sued upon and the brand of the defendants sued against on the ground of the incompeteney of the witness to testify as to these matters.)

George D. Hilton sworn.

By Mr. Alcorn:

Q. Where do you live, Mr. Hilton?

A. Kimble building, New York city.

Q. What is your business?

A. Strictly flour business.

Q. How long have you been in the flour business?

A. Ever since I was 17 years old—for about twenty-five years.

Q. During that time, what has been your particular line of business?

A. My business has been, during that time, representing different mills in the United States. Both winter and spring wheat mills.

Q. What has been your experience in reference to the spring-wheat flour?

A. My experience in reference to spring-wheat flour. I commenced in spring-wheat patent in 1868, and I discovered at once that owing to the fact that the properties of spring-wheat flour
205 is principally gluten and the properties of winter-wheat patent principally starch; therefore the spring-wheat flour, containing principally gluten, would take sixty pounds more water for 196 pounds of flour and would produce on the average about fifty pounds of bread per barrel more than the winter-wheat flour.

Q. About what time did spring-wheat flour first come into use in the East?

A. In 1868, Charles A. Pillsbury, of Minneapolis, and George H. Christian, of Minneapolis, and A. Archambaldt, of Dundas, Minnesota, imported what is known as the Haxall machine and commenced making what was then called the Haxall patent of hard spring wheat. In 1868, the Haxall process used rollers for the reduction of the berry and the stones for the finishing up of the middlings; now the mills in the Northwest use the Smith patent purifier and the Stevens roller.

Q. Is that what is known as the roller process?

A. In all the mills in the Northwest now the rollers are used to reduce the middlings to the proper grade of flour instead of stones which are ignored entirely.

Q. And that is what is known as the roller process?

A. Yes, sir.

Q. Your first acquaintance with the spring-wheat flours was in 1868, and that is the time they were first made in this country and first introduced in the East, is it not?

A. Yes, sir.

Q. And have you since that time been selling spring-wheat flours?

A. Yes, sir, and representing Western mills manufacturing spring-wheat flour under different brands.

Q. In what sections of the country have you sold flour?

A. In New York State, Pennsylvania and the New England States including Detroit, and the Western States.

Q. In what States are you now selling flour?

A. In those same places.

Q. With what mills have you been connected?

A. I have been connected with the Washbourn mills, of Minne-
apolis, the Syre and Domot, of Minneapolis, Alexander
206 Syre, of Monasha, Wisconsin mills and Holton, Elk River,
Minneapolis, Edwin Clarke Melrose, Minneapolis, A. Bettingen & Co., Larimore, Dakota, William C. Litacoe, Graftin, Dakota Territory, and others.

Q. Are you familiar with the Northwestern mills?

A. I am perfectly familiar with the Northwestern mills. Tell me where a mill is located and I will tell you what kind and the quality of the wheat they are compelled to use.

Q. Do you know the Columbia Mill Company, of Minneapolis?

A. I have known the flour since they put it on the Eastern market in 1882. They were organized in 1882.

Q. Do you know what brands they have for their flour?

A. Their principal brand has been called the Columbia Mill Company's Columbia.

Q. What other brand have they?

A. They have no other brand that I know of. The mere name of Columbia any one can use in any mill; I could put it on one of my barrels; I do not desire to do so, because I do not consider it any object.

(Answer of the witness as to the word "Columbia" objected to, as irresponsive and incompetent.)

(The witness is shown the brand of the complainants and the brand of the respondents and is asked whether the two brands are similar.)

A. No, sir; if you wish to counterfeit a mill brand in order to deceive the trade in placing your flour on the market you must of necessity use every letter that is used upon the original brand in order to have it a counterfeit or to be of any use among the trade or to be of use as a deception.

Q. Would the brand of the respondents mislead you if you desired to purchase the flour of the brand of the complainants?

A. No, sir; in no way, shape or form. The flour dealers in the East are shrewd, sharp business men, and every dealer scrutinizes
the barrel head and reads it. Every letter and every word
207 are just as familiar to him as the quality of the flour, and
if you misrepresent it he will call your attention to that fact
when he sees you again.

Q. In your opinion would the purchasers of flour who desire to buy the flour of the complainants upon seeing the brand of the respondents be induced to believe that that was the same as the complainants'?

A. No, sir; in the first place, one brand specifies Columbia Mill Co., 196 Columbia, in blue and red letters; the other brand—the defendants' brand—shows upon the face, instead of Columbia Mill Co., "high grade No. 1 wheat, Columbia," which is entirely different, and is no confliction or misrepresentation on the Columbia Mill Company's brand.

Q. The words "Minneapolis, Minn." upon the barrel head—what do they designate?

A. Minneapolis is the largest spring-wheat milling section in the United States; in fact, all the flour manufactured there is manufactured out of spring wheat, both hard and soft. St. Louis is the largest winter-wheat flour milling section in the United States; was formerly connected with the Union Milling Company, of Detroit, Michigan, a large mill, and the mill company had the name St. Louis on every one of their mill brands.

Q. That was winter-wheat flour?

A. That was winter-wheat flour made from Michigan wheat, and they branded it St. Louis.

Q. Do you know the flour of the complainants branded Columbia?

A. Yes, sir; perfectly familiar with it.

Q. Do you know the flour of the respondents branded Columbia patent?

A. Yes, sir; perfectly familiar with it; one is made from soft spring wheat and the other is made from hard spring wheat.

Q. Which is made from soft spring wheat?

A. The Columbia Mill Company's "Columbia."

Q. What do the words Minneapolis, Minn., on the barrel heads
designate?

208 A. Designate that it is a spring-wheat flour; if you would
put St. Louis on the barrel head it would designate that it
was a winter-wheat flour and was made from winter wheat.

Cross-examined.

By Mr. Strawbridge:

X Q. By whom is the flour of the defendant made which is contained in the barrel on the head of which is marked the words "high grade No. 1, hard wheat, Columbia patent, 196, Minneapolis, Minn."?

(The witness, under instructions of the counsel for the defendants, is requested not to answer that question.)

X Q. Do you know?

A. I do; yes, sir; that question has been asked me a great many times. I will say that the flour pleases as well as any flour I ever sold in my life, and my reply always is, Why do you care where the flour is made so long as it pleases and gives satisfaction?

(Counsel for the complainants gives notice that he will, at 10 o'clock to-morrow, Friday, December 28, 1888, move the circuit court of the United States for the eastern district of Pennsylvania for an order compelling the witness to answer the question above propounded, and he continues his cross-examination subject to this notice.)

(It is hereby stipulated between the counsel for the respective parties of this suit that Edward E. Nicholas, notary public, before whom these depositions are taken, is for all purposes to be considered by the parties hereto as a special examiner in the cause as fully as though appointed by court. Counsel for the complainants requests Examiner Nicholas to certify the depositions of this witness on conclusion of to-day's session to the United States circuit court, and he requests the examiner to produce said depositions in circuit court of the United States for the eastern district of Pennsylvania, at 10 o'clock, to-morrow, Friday morning, December 29, 1888.)

209 X Q. Have you seen the wheat from which the flour sold by the defendant and contained in barrels having upon one of the heads thereof the words "high grade," No. 1, hard wheat, Columbia patent, 196, Minneapolis, Minn., was made?

A. I have not seen the wheat, but I have carefully examined the flour, and I know from the quality of the flour that it was made from hard No. 1 spring wheat.

X Q. Have you seen the wheat from which the complainants' flour was made; I mean the flour branded Columbia Mill Company, 196, Columbia roller process patent, Minneapolis, Minn.?

A. I have not seen the wheat that the flour was made from, but I have carefully examined the flour above alluded to and I know it was made from soft spring wheat.

X Q. When and where did you examine that flour?

A. In New York market and in Philadelphia market during 1887 and 1888.

X Q. How did you come to make these examinations?

A. Compared it with flour that I was selling, patent flour that I was selling.

X Q. What flours did you compare with it?

A. Edwin Clarke's Emperor, Melrose, Minnesota.

X Q. What was your object in making that comparison?

A. In selling flour to any of the Eastern houses I had to compare my own flour with flour that those houses were using to show which was the best.

X Q. Tell me where you made these comparisons.

A. In New York city and Philadelphia.

X Q. Specify the place in these places in which the comparison was made.

A. Hollister, Crane & Co., 90 Broad street, New York; William W. Alcorn & Co., 2029 Market street, Philadelphia, and in my own office, Kemble building, New York.

X Q. From whom did you get complainants' flour that you examined in your own office?

A. I got it in my customer's houses in Hollister, Crane & Co.'s.

210 X Q. Tell me the dates at which you made the three examinations of the complainants' flour you have above mentioned, and give me the names and residences of the persons at each of these three examinations.

A. January, 1887, February, March, April and May, 1887, June, July and August of 1887, and the same months in 1888, in my office, New York city, in the presence of William B. Gottlieb, Kemble building, New York, Hollister, Crane & Co., in January, February, March, April and May, 1887, in George Hollister's presence, of the firm of Hollister, Crane & Co., New York city.

X Q. And in the State of Minnesota, outside of the city of Minneapolis, what milling company's brands of flour are you acquainted with?

A. R. D. Hubbard & Co., Mankato, Minn., Empire Mill Co., New Ulm, Minn., Eagle Mill Co., New Ulm, Minn., Mills & Holton, Elk River, Minn., Edwin Clarke, Melrose, Minn., and others.

X Q. Please give me the names of some of the brands of flour made at the Empire Mill Co.

A. Red Jacket, Boss Bakers, Blizzard.

X Q. Please tell me what words are contained upon the head of the barrel in which the Red Jacket flour is packed.

A. At the top of the brand the words Empire Mill Company's, under that, the words "Red Jacket," in the centre and under this the words "New Ulm, Minn."

X Q. Please give us the names of a few of the brands of the "Eagle Mill Co."

A. Eagle Mill Company's Pure Gold, Eagle Mill Company's Imperial.

X Q. Please give me the words contained upon the head of the barrel in which the "Pure Gold" was packed.

A. At the top of the brand the words "Eagle Mill Co.'s," under these the words "Pure Gold," in the centre at the bottom "New Ulm, Minn."

X Q. What brands are made by Edwin Clarke?

A. Emperor.

211 X Q. Please give me the words contained upon the barrel head of the Emperor brand.

A. At the top of the brand the words "Edwin Clarke's," under these words the word "Emperor," in the centre and under that word the words "all hard spring wheat," under these words the words "New Ulm, Minn." The brand Emperor is used by several mills in the West, but it can only be used as a counterfeit brand when the words Edwin Clarke and Melrose, Minn., is used in connection with the brand Emperor.

X Q. Are all the brands of flour which you have above alluded to made of spring wheat?

A. Yes, sir; all made of spring wheat.

X Q. Is there a recognized difference of quality and value between spring-wheat flour and winter-wheat flour?

A. Yes, sir.

X Q. And they are not sold the one in competition with the other?

A. No, sir; winter wheat is principally starch and spring wheat is principally gluten. Spring-wheat patent is intended for bread and winter-wheat patent is intended for pastry.

X Q. What, if any, business connections have you with the defendants in this case?

A. None at all, sir.

(The testimony of this witness so far as it relates to the identity or similarity of the brands of the complainants and defendants is objected to as incompetent.)

(The further cross-examination of this witness is delayed until the motion above referred to has been heard and decided by the court.)

(It is stipulated that the defendants will close their testimony on or before the twentieth day of January, with the same force and effect as though an order of court was made to that effect.)

Adjourned until Friday, December 28th, at 11 a. m.

212 In the Circuit Court of the United States for the Eastern District of Pennsylvania. In Equity.

THE COLUMBIA MILL COMPANY
vs.
WILLIAM W. ALCORN & COMPANY.

PHILADELPHIA, *December* 28, 1888—11.30 a. m.

At the office of James Alcorn, esq., attorney for the respondents, No. 223 South Sixth street, Philadelphia, Pa.

The further cross-examination of Mr. Hilton is postponed until the question as to his answering is determined by the court.

The motion introduced for 10 a. m. to-day in the United States circuit court is postponed to Friday, January 4, 1889, at 10 o'clock a. m., at the circuit court of the United States in the city of Philadelphia.

CHARLES C. NORRIS, a witness, sworn on behalf of respondents, deposes and says:

Direct examination.

By Mr. ALCORN:

Q. 1. Where do you reside?

A. Philadelphia.

213 Q. 2. What is your business?

A. Commission merchant—flour and grain.

Q. 3. How long have you been in the flour business?

A. I came to Philadelphia in '64 and went in as an employee of Budd & Comley; they were in the same business.

Q. 4. After that you were with S. I. Comley, were you not?

A. In 1866 I went into partnership forming the firm of S. I. Comley & Co.

Q. 5. And do you still continue that business?

A. No; that firm continued until May, 1866, then Mr. Comley retired and I continued the business myself.

Q. 6. Where is your place of business?

A. 235 North Water street, Philadelphia.

Q. 7. In that time, have you dealt in flour principally?

A. Yes, sir.

Q. 8. Are you acquainted with the various spring-wheat flours which are sent to this market?

A. I am acquainted with a great many of them.

Q. 9. Can you name the principal standard spring-wheat flours sold in here?

A. There are a number of them; but Pillsbury's and Washburne flours are considered the standards; but there are many other flours I think just as good.

Q. 10. Which flours command the largest sales in this market?

A. I cannot tell you.

Q. 11. Is the flour of the Columbia Mill Company, branded "Columbia," a standard or well-known flour in this market?

A. I have never handled that flour at all; I do not know much about it; I have heard of parties who used it.

Q. 12. Do you know the flour of the respondents branded "Columbia patent"?

A. No, sir; I do not; I don't know that I ever saw the brand until I saw them here this morning; I mean I did not see respondents'; I have seen the complainants'.

Q. 13. What is the ordinary and usual method of branding flours?

214 A. The usual method of branding it?

Q. 14. Yes; as to the form I mean.

A. That depends very much on the miller himself; yet I believe in the trade here it is customary for the dealers to have a brand of their own.

Q. 15. Is it a stencil?

A. Yes, sir; it is usually a stencil. I do not do any branding myself, and I do not know much about it.

Q. 16. You have seen the brands of various flours?

A. I have seen different brands.

Q. 17. What is the usual form of the brands you have seen—as to their shape and style, I mean?

A. Very similar to those two that I have seen. When a miller brands it himself he has his own idea about the form of the brand,

and I presume the dealer, when he has a brand of his own, has his ideas how to brand it.

Q. 18. Are the stencils usually colored or not?

A. I think the most of Minnesota flour that we have received have been in two colors, similar to that red and blue; sometimes they come just one color, but the majority, as near as I can remember, are two colors.

Q. 19. (The witness is shown the two brands above referred to and is asked whether, in his opinion, those two brands are similar.)

A. No; I should not think they were similar at all.

By Mr. STRAWBRIDGE:

(Question and answer objected to, on the ground that the witness is not a competent person to express an opinion on that subject.)

By Mr. ALCORN:

Q. 20. Would the brand of the respondents, Columbia patent, be likely to deceive a person desiring to buy the flour branded Columbia of the complainants?

A. Do you mean that if I were buying these two flours that I would consider them both the same from the brands?

Q. 21. Yes, sir; or likely to take one for the other.

215 A. No, sir.

(Objection repeated.)

Q. 22. Do you think that the trade would be deceived in taking one flour for the other?

A. I should not think they would; in my experience, if a dealer wants to buy flour he doughs it. You may say that he buys it upon its merits; I can also say that if a person had been buying this brand of flour (pointing to the defendants' brand) and that brand had been offered to him (pointing to the complainants' brand) it would naturally excite a suspicion, and he would test it to see if it was the same.

Q. 23. Why?

A. He would want to know that it was the same or as good flour.

Q. 24. What would induce him to test this brand (pointing to the complainants') if he had been in the habit of receiving this brand (pointing to the respondents')?

A. I should say on account of the different appearance of the brand.

Q. 25. What, Mr. Norris, do the trade understand by the words Minneapolis, Minn., on a barrel head?

A. I presume that they would think that it was made in Minneapolis or Minnesota.

Q. 26. Does it designate anything as to the kind or quality of the wheat?

A. That I do not know.

Q. 27. Does Minneapolis appear upon a winter-wheat flour?

(Question objected to, as leading.)

A. I have never seen any winter-wheat flour with Minneapolis on, as I know of.

Q. 28. What kind of flours have Minneapolis or Minnesota upon them?

A. I should say they were spring-wheat flours.

216 Cross-examined.

By Mr. STRAWBRIDGE:

X Q. 29. If you were buying flour and had been accustomed to buy flour branded in the manner shown on the head of complainants' barrel, and flour were offered to you branded as is shown on the head of defendants' barrel, what difference in the defendants' brand would lead you to examine the defendants' flour to see if it were the same as the flour you had been buying of the complainants?

A. The general appearance of the two brands. One is red and blue and the other is black, this is different from that.

X Q. 30. What, in your opinion, constitutes the difference?

A. Different name is one and the different arrangement of the brand.

X Q. 31. What do you mean by the different arrangement of the brand?

A. This has hard wheat up there, this has not. This has 196 up there and 196 down there. This (complainants'), has roller process there and there is no roller process, there it is patent. People accustomed to buying flour would notice that.

X Q. 32. Who do you mean by people accustomed to buying flour?

A. Flour dealers.

X Q. 33. Whose make of flour do you deal in?

A. You mean spring-wheat flour?

X Q. 34. I mean all kinds.

A. I get flour from different States. I have winter wheat and spring wheat. I have flour from Fergus Falls and from Minneapolis.

X Q. 35. What brand of flour do you get from Fergus Falls, Minn.?

A. I get Page's Best and A No. 1 patent.

X Q. 36. Please tell me how the barrel head is marked, in which the flour A No. 1 patent is packed.

217 A. I do not think I can do that. The flour comes to the warehouse and I do not see it; I have seen it years ago, but I do not know that the brand is the same.

X Q. 37. As near as you can recollect, what was marked upon the head of the barrel in which the A No. 1 patent flour was packed?

A. There was a large "A" on it, I think, in the centre, and "No." on one side and "1" on the other, but I cannot give you the exact description of it without seeing it.

X Q. 38. What name was on the flour?

A. The Fergus flour mills. I think it was below, but I am not sure, it may have been at the top, I am not sure about that.

X Q. 39. What was down here?

A. I think there was Fergus Falls, Minnesota.

X Q. 40. What other Minnesota flour did you handle?

A. I handled Crocker, Bisk & Co. flour and Morse & Sammis.

X Q. 41. Outside of Minneapolis in Minnesota?

A. Hundreds of different brands.

X Q. 42. Is spring-wheat flour materially different in quality and in value from winter-wheat flour?

A. It is considered so; yes, sir.

X Q. 43. And they are not sold in the market, one in competition with the other, are they?

A. No, sir; I don't think they are. When spring-wheat flour comes up high in price they sometimes use winter-wheat flour to take its place.

X Q. 44. Which is lowest?

A. Winter-wheat flour is generally lower than spring-wheat flour.

By Mr. Alcorn:

X Q. 45. Examine on the barrel head of the complainants what is at the top.

A. Columbia Mill Company.

X Q. 46. There is no such name as that or any other at the head of the other brand, is there?

A. I do not see it there.

218 William T. Brook, a witness sworn on behalf of the respondents, deposes and says:

Direct examination.

By Mr. Alcorn:

Q. 1. Where do you reside?

A. 5048 Green street, Germantown, Philadelphia.

Q. 2. What is your business?

A. Flour and grain commission merchant, of the firm of Brook & Pugh.

Q. 3. Do you deal in spring-wheat flours?

A. Yes, sir; all kinds.

Q. 4. Are you acquainted with the various flours and brands of the spring-wheat mills?

A. With a number of them, not with all.

Q. 5. What are the principal brands of spring-wheat flour sold in this market?

A. That is a question hard to answer. We consider ours one of the leading, whether others do or not. I will commence with ours. "White Satin," manufactured by D. R. Barber & Sons; Pillsbury's; Washburn, Martin & Co.'s Gold Medal.

Q. 6. Do you call the Columbia Mill Company's patent one of the leading spring wheat flours?

A. Yes, sir; though it is not so well known as some of the others.

Q. 7. Have you ever handled the Columbia Mill Company's brand, called Columbia.

A. No, sir; we have had others of their flours for some years past; but if I remember right they were under a letter.

Q. 8. That is their patent flour?

A. I cannot answer that question; whether it was a patent or not I do not remember; I think it was what they call their straight flour.

Q. 9. Have you ever had any of the flour of the defendants branded Columbia patent?

A. No, sir.

219 Q. 10. The witness is shown the two brands above referred to, that is one of the complainants and the other of the respondents, and is asked whether, in his opinion, those brands are similar.

A. No, sir; I do not consider them as such.

Q. 11. In your opinion, would a purchaser be deceived desiring to purchase the Columbia Mill Company's Columbia by the brand of the respondents, the Columbia patent?

A. No, sir; I should not think so.

(Objected to, as being incompetent.)

Q. 12. You have a grain elevator, have you not?

A. Yes, sir.

Q. 13. Are you familiar with the method and styles of brands; I mean as to the way they are placed on the barrel?

A. I rather think I am.

Q. 14. What is the usual form of a brand; that is, as to its shape?

A. Both of these are about the usual form.

Q. 15. Is the brand in colors usually?

A. Well, more so now than they used to be; yes, sir.

Q. 16. What do you understand by the words " Minneapolis " or " Minnesota " being on a barrel head?

A. As soon as I would see Minneapolis, Minn., on a barrel head I would form my opinion at once that it must be spring-wheat flour, made from spring wheat.

Cross-examined.

By Mr. STRAWBRIDGE:

X Q. 17. And unless you know to the contrary you were led to believe that the flour was made in Minnesota?

A. Not necessarily so; no, sir.

X Q. 18. What brands of flour do you deal in; Minnesota I mean?

A. We handle a great many different brands, sometimes we receive flour from one mill and then again we do not receive it. I

220 could give you quite a number that we are getting now. We are handling flour from Fergus Falls, and we have handled flour from Minnesota City, Faribault, Northfield.

X Q. 19. What brand do you buy from Minnesota City?

A. We generally buy it under a letter, and then again we get a flour brand, "Northern Light."

X Q. 20. Please tell me what words are contained upon the barrel head in which the "Northern Light" flour is packed?

A. The words "Northern Light" are in red letters across the middle of the barrel head, the word "patent" appears on the head somewhere, and the regulation figures "196" and then simply "Minnesota."

X Q. 21. What brand do you get from Faribault?

A. We have that under letters.

X Q. 22. Please tell me what words are contained upon the barrel head containing the Faribault flour.

A. Simply "S. L." is the only letters we have had on it; I may add that in our business as commission merchants we find a great many of the trade who put their own brands upon the barrels, and it is convenient for them to have this flour come under a letter.

X Q. 23. What place is marked upon the barrel head mentioned in the last question?

A. Any place at all; it is simply a shipping mark.

X Q. 24. You have used the word trade in your deposition, what do you mean by that word?

A. We mean our customers; that is, those we sell to.

X Q. 25. Who are they; I do not mean their names.

A. Principally to jobbers and dealers, some few to grocers and cracker bakers; our principal business is to those who sell to bakers.

X Q. 26. How long have you been in your present business?

A. I started in the milling business in 1876.

X Q. 27. What was your age?

A. At that time I was 17 years of age.

X Q. 28. I believe you said that you had never sold either of those brands?

A. No, sir.

221 By Mr. ALCORN:

X Q. 29. Mr. Brook, your father then was in this firm, was he not?

A. Yes, sir.

X Q. 30. And was in the same business that you are in?

A. Yes, sir; on his death I succeeded him in the firm of Brook & Pugh.

X Q. 31. (The barrel head with James Dudley & Co., fancy patent Pure Gold trade-mark, 196, Minneapolis, Minn., shown witness, and he is asked whether he knows that brand.)

A. I know the brand; yes, sir.

X Q. 32. Do you know where that flour is made?

A. No, sir.

By Mr. STRAWBRIDGE:

X Q. 33. How long have you known this brand Columbia, of the defendants having been on the market in Philadelphia?

A. I cannot answer that; I have known it for several years past; how long I cannot say.

CHARLES OTTO SCHWARZ, a witness, sworn on behalf of the respondents, deposes and says:

Direct examination.

By Mr. ALCORN:

Q. 1. Where do you reside?

A. No. 1712 South Sixth street, Philadelphia.

Q. 2. What is your business?

A. Baker.

Q. 3. How long have you been in the baking business?

A. I was born and raised in the business.

Q. 4. Do you know the flour of the defendants, Alcorn & Co., branded Columbia patent?

A. Yes, sir.

222 Q. 5. You have purchased that flour?

A. Yes, sir.

Q. 6. From the defendants?

A. Yes, sir.

Q. 7. Do you know the flour of the complainants, branded The Columbia Mill Company's Columbia?

A. Yes, sir; I have used that.

Q. 8. Were you a customer of Alcorn & Co. before purchasing that flour?

A. Yes, sir.

Q. 9. And are you a customer of theirs now?

A. Yes, sir.

Q. 10. When you bought the flour, how did you buy it?

A. Bought it in a mixture; both of them in a mixture.

Q. 11. You did not buy the Columbia Mill Company's Columbia from Alcorn & Co., did you?

A. I bought it from Linnerd & Gibbs.

Q. 12. And they were both purchased in mixtures?

A. Yes, sir.

Q. 13. What do you mean by a mixture?

A. Spring and winter wheat; get in warm weather two springs and a winter, and in cold weather two springs and two winters.

Q. 14. (The two brands referred to, one of the complainants' and the other of the respondents', shown witness, and he is asked whether in his opinion those two brands are similar.)

A. No, sir; they are not.

Q. 15. When you purchased the Alcorn & Company Columbia patent did you think you were buying the Columbia Mill Company's Columbia?

A. No, sir; I did not.

Q. 16. What did you understand the word Minneapolis upon the respondents' barrel head to mean?

A. I understood it was a spring wheat.

Q. 17. Were you induced to believe that it was made or manufactured in Minneapolis or Minnesota?

A. Not at all.

Q. 18. You have used both of these flours, have you?

223 A. Yes, sir; I have used both of them.

Q. 19. Which was the better flour of the two?

A. I considered this flour (pointing to the respondents') the best, on account of it being the strongest.

Q. 20. In buying flour do you sample or test it?

A. No, sir.

Q. 21. How do you purchase?

A. I do not ask for any particular brand; I just say 100 or 102 barrels of mixture and they send me what they think will suit.

Q. 22. Then upon a trial what takes place?

A. If it does not suit we return it. We may give it several nights' trial, and if it does not suit we return it.

Cross-examined.

By Mr. STRAWBRIDGE:

X Q. 23. Which is the cheaper flour, the defendants' or the complainants'?

A. I have paid more for the complainants' than I have for the defendants'; the defendants' is the best flour.

X Q. 24. What makes you think that flour contained in a barrel with Minneapolis on it is made from spring wheat?

A. Because it is wheat grown in the Northwest, in Minnesota and Dakota, and the flour is generally made from that sort of wheat?

X Q. 25. Is there any winter-wheat flour made in Minnesota?

A. Not as I know of.

X Q. 26. Therefore you are right in believing, when you see it marked Minneapolis, Minn., that it is spring-wheat flour?

A. Yes, sir; we have always found it to be spring wheat when it is marked Minneapolis, Minn., or Minnesota.

X Q. 27. When it is marked with the words Minneapolis, Minn., or Minnesota you are liable to believe it is spring-wheat flour, for the reason that you have no knowledge of any flour except spring-wheat flour being made in Minnesota; is that so?

224 A. I have no knowledge that there is any other; and from my own experience and seeing them marked that way, I have an idea that there is nothing else made in Minnesota but spring wheat.

X Q. 28. How long have you purchased flour from the defendants in this case?

A. For five years.

X Q. 29. Who requested you to testify in this case?

A. Mr. Samuel Alcorn asked me about my using this flour and if

I would not come up and state what I thought about it, and I told him I had used both of these brands.

X Q. 30. What did he tell you to testify to?

A. He did not tell me to testify to anything, only what I knew and thought was right.

Meeting adjourned until Thursday, January 3d, 1889, at 11 a. m.

225 In the Circuit Court of the United States for the Eastern District of Pennsylvania. In Equity.

THE COLUMBIA MILL COMPANY
vs.
WILLIAM W. ALCORN & COMPANY.

PHILADELPHIA, *January*, 3, 1889—11.30 a. m.

At the office of James Alcorn, Esq., attorney for the respondents, No. 223 South Sixth street, Philadelphia, Pa.

ALBERT A. KEENE, a witness sworn on behalf of the respondents, deposes and says:

Direct examination.

By Mr. ALCORN:

Q. 1. Where do you reside?

A. No. 800 Corinthian avenue.

Q. 2. What is your business?

A. Flour business.

Q. 3. How long have you been in the flour business?

A. I have been in the flour business for nine years.

Q. 4. At the present time what is the nature of your business?

A. Selling flour in car-loads for mills in different parts of the West.

226 Q. 5. Do you represent any mills of Minneapolis?

A. Yes, sir; Sidle, Fletcher, Holmes & Co. I came from Minneapolis to Philadelphia.

Q. 6. Are you familiar with most of the Northwestern mills?

A. Yes, sir; in a general way.

Q. 7. Do the different mills have different brands?

A. Yes, sir.

Q. 8. Do many of them have the same brands?

A. Some; yes, sir.

Q. 9. Do you sell winter or spring wheat flours?

A. Both. I sell winter-wheat flour made in Illinois and Ohio.

Q. 10. You have seen the brands of the Columbia Mill Co.'s Columbia and the Columbia patent, have you not?

A. Yes, sir.

Q. 11. The two brands, one of the complainant's and the other of the respondents' shown witness, and he is asked whether he is familiar with these brands.

A. Yes, sir.

Q. 12. Are those brands, in your opinion, similar, or likely to mislead?

(Question objected to, as incompetent.)

A. They are not.

Q. 13. Would the brand of the defendants, in your opinion, mislead the purchaser who desired to buy the flour branded with the brand of the complainants?

(Objection repeated.)

A. It would not.

Q. 14. What is the usual method of branding the flour, that is, as to the style?

A. Do you mean the mechanical process of doing it?

Q. 15. Yes, as to the shape and stencil.

A. The usual method is to place the name of the firm or the name of the mill around the top, as Columbia Mill Co., then a dozen particular brands that they have across the centre and then the location of the mill at the bottom.

227 Q. 16. What do you understand by Minneapolis or Minnesota on a barrel head?

A. I understand that there is spring-wheat flour in that barrel.

Q. 17. Do you know whether the flour of the defendants, branded Columbia patent, is spring or winter wheat flour?

A. All that I have ever seen of it was spring-wheat flour.

Q. 18. (A brand marked W. Listman, Marvel, Minn., shown witness, and he is asked whether he knows where that flour is made.)

A. I do.

Q. 19. Where is it made?

A. At La Crosse, Wisconsin.

(Objected to, as incompetent.)

Q. 20. (Brand marked James Dudley & Co., Pure Gold, Minn., shown witness, and he is asked if he knows where that flour is made.)

(Question objected to, as incompetent.)

A. I do.

Q. 21. Where is it made?

A. In Huston, Minn.

Q. 22. Is it usual for flours not made either in Minneapolis or Minnesota to have these words upon them?

A. Yes, sir; it is quite common.

(Objection repeated.)

Q. 23. When those names are upon the barrel, what do the trade understand by them?

A. They understand that the flour is made from spring wheat.

(Objection repeated.)

Q. 24. From your experience in selling flour, does the brand ever aid in the sale?

A. No, sir.

Q. 25. Upon what does the sale take place usually?

228 A. Upon the merits of the flour and the reputation of the mill.

Q. 26. For the same quality of flour, does your mill and others have a variety of brands?

A. Yes, sir.

Q. 27. Is it customary with the mills to put upon the barrel head brands desired by the purchaser?

A. It is; yes, sir.

Q. 28. And is it also customary for them to send flour without any brand, or under blank heads?

A. Yes, sir; but under a letter usually.

Cross-examined.

By Mr. STRAWBRIDGE:

X Q. 29. Do you sell flour made in Minnesota outside of the city of Minneapolis?

A. No, sir.

X Q. 30. What brands of flour do you sell?

A. Some brands of granulated, corrugated, Truth, Minnehaha, Rosebud, Best, No. 1, Ironclad, Ajax, Stonewall, Joe, Murray Hill and any other the buyer may want.

X Q. 31. Upon what part of the barrels are the respective brands found stenciled?

A. In the centre of the head.

X Q. 32. What words are stenciled at the top of the head?

A. They vary; sometimes they are Northwestern mill, sometimes Sidle, Fletcher, Holmes & Co., sometimes Sidle Fletcher, sometimes F. H. Co.

X Q. 33. The names last mentioned are the names of the manufacturer of the flour?

A. Yes, sir; that and the name of the mill.

X Q. 34. What words are stenciled at the bottom of the head?

A. Sometimes Minneapolis, Minnesota, sometimes merely Minnesota.

229 X Q. 35. What words are stenciled above the brand and below the name of the mill?

A. "Roller process" in some and in others Hungarian process.

X Q. 36. What words are stenciled below the brand name and above the words Minneapolis, Minn.?

A. Some don't stencil anything.

X Q. 37. You say that only spring-wheat flour is made in Minneapolis?

A. That is all.

X Q. 38. For that reason when you see a barrel branded Minneapolis you are ready to believe it is spring-wheat flour?

A. Yes, sir; for that reason and for the reason that I have never seen anything but spring-wheat flour in a barrel branded Minneapolis, Minn.

X Q. 39. Have you ever sold the flour made by the defendants in this case?

A. No, sir.

By Mr. ALCORN:

X Q. 40. Is it usual to put the figures 196 on the barrel head?

A. Yes, sir; it is usually done.

X Q. 41. And that denotes what?

A. That there is 196 pounds of flour in the barrel.

X Q. 42. Do you always put the name of the mill at the top of the barrel head?

A. Not always; no, sir; we never have when we shipped the flour under a letter.

X Q. 43. Why do you leave it out, then?

A. For the reason that the buyer has his own stencil which he wants to put on himself.

X Q. 44. Does the buyer frequently put his own name instead of yours?

A. He never puts ours.

X Q. 45. But he puts his own sometimes?

A. Yes, sir.

230 By Mr. STRAWBRIDGE:

X Q. 46. Then, in flours branded with the name above mentioned by you it is usual in some cases to omit the names of the mill which in other cases is contained at the top portion of the barrel head?

A. We never do, only with a few of our brands. The brand No. 1, we leave the mill name off altogether.

X Q. 47. In some cases you put the mill name on?

A. Nearly all cases.

X Q. 48. Then, when the purchaser sees that brand with the mill name off he is led to believe that it is the manufacture of your company?

A. He does when he sees the mill name on, and when it is not it is shipped directly to me and I tell him it is.

X Q. 49. And in view of the fact that the mill name is left off in many cases and that you in many of such cases tell your customer that it is the product of your mill, such a purchaser when he sees flour so marked on the market will understand that it was the product of your company?

A. Yes, sir; he could not tell from the head of the barrel positively that it was; he could only tell from another distinguishing mark which we put on the other end of the barrel.

By Mr. ALCORN:

X Q. 50. If the purchaser from your customer should get a brand which is No. 1 without your mill's name upon it, he would not know it was the product of your mill, would he?

A. No, sir; if he had been in the habit of buying our flour he would not believe that it was without the mill name on and the cook book inside of the barrel.

X Q. 51. In a brand of the kind you speak of without your mill name on it, would Minneapolis or Minnesota be at the bottom of a barrel?

A. No, sir.

X Q. 52. You do make some brands with your mill name at the top, probably some without the words Minneapolis on it, do you not?

A. Yes, sir.

231 By Mr. STRAWBRIDGE:

X Q. 53. How do you know what a purchaser would know or believe when he purchased a barrel upon the head of which one of your brands is marked, and the name of the milling company is taken therefrom?

A. I know it from experience.

X Q. 54. You are able from experience to tell what other people know and believe, are you?

A. From my experience I have found people that know and believe that way.

X Q. 55. And there are quite a large number that you have not met?

A. Several; yes, sir.

X Q. 56. Do you know what they know and believe?

A. Don't profess to.

X Q. 57. And it is only a matter of opinion, is it?

A. Yes, sir; that is what you asked me for.

By Mr. ALCORN:

X Q. 58. How many mills in the Northwest have the brand "Best"?

A. I cannot tell you how many there are; more than five.

CHARLES DUNWOODY, a witness sworn on behalf of the respondents, deposes and says:

Direct examination.

By Mr. ALCORN:

Q. 1. Where do you reside?

A. In Narborth, Montgomery county, Penna.

Q. 2. What is your business?

A. Flour, grain and feed.

Q. 3. Where are you in business?

A. 1909 Market street, Philadelphia.

232 Q. 4. How long have you been in the flour and grain business?

A. About twenty years.

Q. 5. Are you familiar with the methods of branding flour, and with the various brands of flour sold in this market?

A. Somewhat.

Q. 6. In the twenty years you have been in the flour business you have been handling flour to a considerable extent, have you not?

A. More or less.

Q. 7. Do you know the brands of the complainant and defendant-?

A. I have seen them.

Q. 8. (The brands of the complainant and respondent- shown witness, and he is asked whether, in his opinion, those two brands are similar, or would be likely to mislead.)

(Question objected to, as incompetent.)

A. I would not consider them similar; I could not say that they would mislead.

Q. 9. What do you understand by "Minneapolis" or "Minnesota" on a barrel head, as in this case?

A. I understand that it is quite frequent for mills outside of Minneapolis or Minnesota to put the words "Minneapolis" or "Minnesota" on their brands.

Q. 10. Does it designate to you, or to the trade, any particular character of flour?

A. It would indicate that it was spring-wheat flour; I have never known any other kind of flour to be branded with "Minneapolis" on it.

Q. 11. Do you know the flour of the complainants branded "Columbia"?

A. Not to say familiar with it.

Q. 12. Have you come in contact with it much in this market?

A. No, sir.

Q. 13. Do you know whether or not it is looked upon — standard flour, in this market?

A. It is not considered a standard flour.

233 Cross-examined.

By Mr. STRAWBRIDGE:

X Q. 14. What brands of flour do you sell?

A. Washburne, Crosby & Co. Superlative Imperial, Dun & Carson's Best, Charles Bigler's North Star.

X Q. 15. On what part of the barrel head is the brand name stenciled?

A. The brand name is usually branded on the middle of the top head, that is where we look for the brand name.

X Q. 16. What words are usually stenciled at the upper portion of the head, on which the brand is stenciled?

A. The usual custom is for the milling firm name.

X Q. 17. What words are usually stenciled at the bottom of the head, under the brand name?

A. As a general thing, the place where the flour is made.

X Q. 18. You say you have never known any flour to be made in Minneapolis, except spring wheat? Is that the reason you would be led to believe that the flour contained in a barrel having the word "Minneapolis" on the head, that it was spring-wheat flour?

A. Yes, sir.

X Q. 19. And for that reason, if you saw a barrel branded "St. Louis," you would believe that it was made from winter wheat?

A. Yes, sir; it is not all flour branded that is "St. Louis" that is made in St. Louis.

X Q. 20. Have you ever sold the complainants' flour, or the defendants' flour in this case?

A. No, sir.

(The motion entered for Friday, at 10 o'clock is by consent postponed until 10 o'clock next Tuesday, January 8, 1889.)

234 ALEXANDER HENDERSON, a witness sworn on behalf of the respondents, deposes and says:

Direct examination.

By Mr. ALCORN:

Q. 1. Where do you reside?

A. 1917 North Eleventh street.

Q. 2. What is your business?

A. Flour business, of the firm of Bender & Henderson.

Q. 3. Where is your place of business?

A. 1657 Germantown road, Philadelphia.

Q. 4. To whom do you sell flour?

A. We sell principally to bakers.

Q. 5. How long have you been in the flour business?

A. We have been in it about 7 years. Sold to bakers that long.

Q. 6. Before that you sold to families?

A. Yes, sir.

Q. 7. Are you familiar with the brand of the complainants called Columbia?

A. No, I never saw it.

Q. 8. Have you seen the brand of the defendants, Columbia patent?

A. Yes, sir; we have handled some of that brand.

Q. 9. (The brand of complainants and respondents shown witness, and he is asked whether in his opinion those brands are similar or likely to mislead.)

A. I should not think so if I was going to buy them.

(Objected to, as incompetent.)

Q. 10. If you wanted to buy 100 barrels of Columbia Mill Co.'s Columbia and you were delivered this brand, Columbia patent, would you be induced to take this as being the Columbia Mill Co.'s Columbia?

A. I would not consider they were the same.

(Objection repeated.)

235 Q. 11. How do you buy the flour usually?

A. We usually sample it unless it is a straight brand that we are running on.

Q. 12. When you bought the defendants' Columbia patent, did you sample it?

A. Yes, sir.

Q. 13. Had you been dealing with the defendants before buying the brand Columbia patent?

A. Yes, sir.

Q. 14. And do you still deal with them?

A. Yes, sir.

Q. 15. And do you now purchase a brand, Columbia patent?

A. No, sir. I do not recollect how long, but I think it has been six or eight months since we have had that brand.

Q. 16. What do the words "Minneapolis" or "Minnesota" or either of them upon a barrel head indicate to you?

A. Spring wheat.

Q. 17. In your opinion is that the understanding of the trade?

A. That is my understanding of it.

Cross-examined.

By Mr. **Strawbridge**:

X Q. 18. What brands of flour do you sell?

A. We sell Gold Medal, Saratoga Success, White and Gold, A No. 1, Patent Crocker's Best; these are the principal patents we sell.

X Q. 19. In what position are these brand names stenciled upon the heads of barrels?

A. Across the middle, similar to those (pointing to the two brands).

X Q. 20. What words are placed at the top of the head opposite the brand name?

A. Sometimes the name of the mill.

X Q. 21. And what words are placed at the bottom of the head under the brand name?

236 A. Minneapolis, Minn., or the place where the flour is made.

X Q. 22. Is it your understanding that all flour made in Minneapolis, is made from spring wheat?

A. Yes, sir.

X Q. 23. And for that reason, if you would see Minneapolis on a barrel head you would believe it to contain spring-wheat flour?

A. Yes, sir.

X Q. 24. Have you sold any of the complainants' flour?

A. No, sir; never had a barrel of it.

By Mr. **Alcorn**:

X Q. 25. Did you ever have any flour of the Columbia Mill Company?

A. No, sir; never had a barrel of it.

X Q. 26. I do not mean of this particular brand, but of any brand?

A. No, sir; never had any brand.

Meeting adjourned until Monday, January 7, 1889, at 11 a. m.

237 In the Circuit Court of the United States for the Eastern District of Pennsylvania. In Equity.

THE COLUMBIA MILL COMPANY
vs.
WILLIAM W. ALCORN & COMPANY.

Friday's meeting at 2 p. m., postponed until Tuesday, 15th, 2 p. m.

PHILADELPHIA, *January* 15, 1889—2.30 p. m.

JACOB A. MAIER, a witness sworn on behalf of the respondents, deposes and says:

Direct examination.

By Mr. ALCORN:

Q. 1. What is your business?

A. Flour buying and selling flour.

Q. 2. You are a member of what firm?

A. W. S. Maier & Co.

Q. 3. Where is your place of business?

A. 1617–19 American street, Philadelphia.

Q. 4. To whom do you sell?

238 A. Bakers, principally; bakers, grocers and consumers.

Q. 5. How long have you been in the business?

A. About 6 years.

Q. 6. Do you know the defendants in this case?

A. Yes, sir.

Q. 7. William W. Alcorn & Co.?

A. Yes, sir.

Q. 8. Do you know their flour which is branded Columbia patent?

A. Yes, sir.

Q. 9. Do you know the flour of the Columbia Mill Co. branded Columbia?

A. Yes, sir; I know of it.

Q. 10. You have seen this brand Columbia patent of the defendants' Columbia patent before, have you not?

A. Yes, sir.

Q. 11. (The brand of the complainants and the brand of the respondents shown witness, and he is asked whether, in his opinion, those two brands are similar.)

A. No; I do not think so.

(Question objected to, as incompetent.)

Q. 12. What do you understand by the words Minneapolis or Minnesota on a barrel head?

A. I understand that the flour is spring wheat.

Q. 13. You understand that to be spring-wheat flour?

A. Yes, sir.

Q. 14. Did you ever buy any flour of the defendants branded Columbia patent?

A. Not to my knowledge.

Q. 15. I mean of Alcorn & Co.

A. Not to my knowledge.

Q. 16. Do you consider that the brand Columbia patent would mislead anybody into buying that as the flour of the Columbia Mill Co. branded Columbia?

A. No, sir.

(Question objected to, as incompetent.)

239 Cross-examined.

By Mr. Strawbridge:

X Q. 17. You are a customer of William W. Alcorn & Co.?

A. Yes, sir.

X Q. 18. What other brands of flour do you sell?

A. Hard to tell, there are so many.

X Q. 19. Give me some of them.

A. Brilliant, Best, Pure Gold, Superlative, First Love, Peerless, Perfection, High Grade.

X Q. 20. What brands do you sell which are made in the State of Minnesota outside of the city of Minneapolis?

A. Pure Gold, Superlative, Best and Gold Medal at times. We have had a good many other brands which we are not selling now.

X Q. 21. What marks or words are contained upon the heads of the barrels containing those brands of flour other than the brand names you have mentioned.

A. The word Minneapolis usually appears.

X Q. 22. In the brand Pure Gold what words are at the top of the head?

A. James Dudley & Co.'s.

X Q. 23. What words are under James Dudley & Co.'s?

A. I think Minneapolis is at the bottom of the head, and above that the words fancy patent.

X Q. 24. By whom is the brand Gold Medal made?

A. Washburn, Martin & Co.

X Q. 25. There is a brand called Superlative made in Minneapolis; by whom is that made?

A. James A. Christian & Co.

X Q. 26. On the barrel heads containing the flours bearing the brands which you have mentioned, it is, I suppose, the usual custom to, at the top of the head, put the manufacturer's name.

A. Yes, sir.

X Q. 27. Under that and across the middle of the barrel head the brand name?

240 A. That is the way the brands appear; we do not make any flour.

X Q. 28. Under the brand name the town and State from which it comes?

A. Not always.

X Q. 29. But as a general rule?

A. I do not know; they usually put the State, not the town.

X Q. 30. And frequently also the name of the town from which it comes?

A. Sometimes.

X Q. 31. Have you ever sold the flour of the complainants?

A. Yes, sir.

X Q. 32. What was the brand name contained upon it?

A. Under a letter and under the brand of Best.

X Q. 33. Under any other name?

A. Superlative.

X Q. 34. Under any other name?

A. Gold Dust. I am mistaken; those brands are the brands of the defendants.

X Q. 35. Please state whether you have ever sold the flour made by the Columbia Mill Company, the plaintiffs in this case?

A. Yes, sir.

X Q. 36. Which brand did you sell?

A. Golden Rod.

X Q. 37. Do you now sell it?

A. No, sir.

X Q. 38. How long ago has it been since you have sold it?

A. I cannot tell the exact time, about two years ago; around that time.

X Q. 39. How long have you been in the business of buying and selling flour?

A. Six years.

X Q. 40. What is your age?

A. Twenty-four.

241 X Q. 41. What position do you occupy in the firm with which you are connected?

A. I buy the flour, keep the books, etc. Inside business.

X Q. 42. What do you mean by inside business, in the office?

A. Yes, sir; buying and shipping of flour.

X Q. 43. Who are members of the firm?

A. Myself, William S. Maier, my brother and my father.

X Q. 44. Do you know by whom the flour of the defendants marked "Columbia" is made and where it is made?

A. I do not know the particular place; in fact, I do not know where it is made nor who makes it.

X Q. 45. To the best of your knowledge all the flour made in Minneapolis is made from spring wheat?

A. Yes, sir.

X Q. 46. Therefore, when you see flour branded Minneapolis or Minnesota you believe it to have been made from spring wheat?

A. Either Minneapolis or Minnesota.

J. WESTLEY SUPPLEE, a witness, sworn on behalf of the respondents, deposes and says:

Direct examination.

By Mr. ALCORN:

Q. 1. What is your business?
A. Flour commission merchant.
Q. 2. And your place of business is?
A. 1831–33 Market street, Philadelphia.
Q. 3. How long have you been in the flour business?
A. About 25 years.
Q. 4. You have been in the flour business that long?
A. Yes, sir.
Q. 5. You do a very large business in the way of receiving spring-wheat flour and selling it in this market?
A. We do a fair amount of business.
242 Q. 6. You are acquainted with the defendants in this suit, William W. Alcorn & Co.?
A. Yes, sir.
Q. 7. You are considered as the largest, at least, one of the largest dealers in flour in this city, are you not?
A. If you would say one of the largest I would say we are so considered.
Q. 8. You would not like to say you are the largest?
A. I would not like to say that.
Q. 9. What are the principal spring-wheat flours sold in this market?
A. I should quote Pillsbury's and Washburn's Gold Medal; these are the leading brands.
Q. 10. Are you acquainted with the complainants, The Columbia Mill Company?
A. I know one member of the firm.
Q. 11. Do you know their patent flour?
A. Yes, sir; I believe I have seen their patent flour; I bought it some years ago.
Q. 12. What do you mean by a patent?
A. A miller makes a patent and then he makes a baker's afterwards. Or they may make a patent and then a baker's.
Q. 13. Have you ever purchased the flour of the Columbia Mill Company branded "Columbia"?
A. I do not recollect purchasing it under the brand of Columbia.
Q. 14. Under what brand have you purchased their flour?
A. Golden Rod.
Q. 15. Has more than one of the mills of the Northwest the same brand of flour?

(Question objected to, as incompetent and irrelevant.)

A. Let me get the question over again.
Q. 16. (Question repeated.)

A. Well, they most all brand Minneapolis and Minnesota, and
some of them have the same distinguishing brand like this
243 here, with the name across the centre. (The witness pointed
to the brand of the defendant- and put his finger on the word
Columbia.)

Q. 17. Are the words mentioned here by the witness Best, Superlative, and several other names common to brands of the Northwestern mills?

A. Common to all mills, Northwestern and through the country at large.

Q. 18. Where are spring-wheat flours made?

A. In Wisconsin, Minnesota, Dakota; some are made in Iowa and some in the northern part of Illinois and Buffalo, N. Y.

Q. 19. What is usually placed upon the barrel head of spring-wheat flours, no matter where made, to distinguish them as spring-wheat flours?

A. Some are branded Minneapolis and some Minnesota; I have known some not to have either on the brand—neither Minneapolis nor Minnesota.

Q. 20. Does the words Minneapolis, Minnesota, designate upon a barrel head the place of manufacture?

A. Not always.

Q. 21. Are you acquainted with the flour of the defendants, William W. Alcorn & Company, which is branded "Columbia patent"?

A. I think I bought a lot of that brand from him at one time.

Q. 22. Do you know whether that is spring or winter wheat?

A. Spring-wheat flour.

Q. 23. Have you seen the brand of the complainants branded "Columbia," this brand (pointing to the complainants')?

A. Yes, sir.

Q. 24. Did you ever buy any of that flour?

A. No, sir.

Q. 25. (The witness is shown the brand of the complainants' Columbia and the brand of the defendants' Columbia patent, and is asked whet-er, in his opinion, those brands are similar or would be likely to mislead.)

244 A. I do not think so; there is quite a difference in the two brands.

(Question objected to as incompetent.)

Q. 26. What do the figures 196 designate?

A. The number of pounds in a barrel.

Q. 27. Is that usually upon a barrel?

A. Yes, sir.

Q. 28. In selling flour, does the name across the middle, known as the designating brand, enter into the inducements for the sale; in other words, is the flour sold upon that brand name?

A. Better repeat that question.

(Question repeated.)

A. Do you mean this vertical one?

Q. 29. That is what I mean.

A. There are some few brands that are known that have a general reputation would bring more money than a brand that might be as good, but not so well known.

Q. 30. What brands, for instance?

A. Pillsbury's Best or Pillsbury's Success; Washburne's Gold Medal or Christian's Superlative.

Q. 31. Have or have not any other mills the same brands which you have mentioned?

(Objected to.)

A. There are other mills which have the brand of Best and Superlative.

Q. 32. Thus in offering for sale one of the brands you have spoken of as having a reputation, how are they designated from the others?

A. By having the firm's name added to it.

Q. 33. Therefore, when you speak of the standard Pillsbury's Best its reputation is upon the name of the firm connected with the brand name?

A. Yes, sir; Pillsbury's Best, or Washburne's Gold Medal; there are two flours made in Minneapolis under the brand of Gold Medal designated by Washburne's Gold Medal and Galaxy Gold Medal.

245 Q. 34. Does the mere name across the middle then enter into the reputation of the flour?

(Objected to as leading.)

A. Not the mere name of "Gold Medal" or "Success" would not.

Q. 35. What connection did you recently have with the commercial exchange? I do not mean to say quite recently.

A. I was president of the commercial exchange.

Q. 36. And you are now president of the Corn Exchange National bank?

A. Yes, sir.

Q. 37. How are patents designated upon the commercial exchange in making sale of them or in their quotation?

A. Do you mean spring-wheat patents or winter-wheat patents?

Q. 38. How are they named in the quotations of the market?

A. Spring-wheat patents.

Q. 39. Are the spring-wheat patents called by any other name in the price-current, or in your circulars?

A. Not in our circulars, unless it was the sale of any particular brand and then it would be called by the brand.

Q. 40. In the publication of the daily market, by what name are spring-wheat patents called?

A. Spring-wheat patents are quoted as "spring-wheat patents."

Q. 41. In the price-current, how are spring wheats called or by what name are the- called?

A. They are called "spring-wheat patents," and then there are a variety of names in regard to Wisconsin patents and Minnesota patents.

Cross-examined.

By Mr. STRAWBRIDGE:

X Q. 42. How do you know from what wheat the defendants' flour branded "Columbia" is made?

A. How do we know?

246 X Q. 48. How do you know?

A. We judge that all flour coming from Minneapolis is made from spring wheat.

X Q. 44. And that is the reason that you have answered that the defendants' flour branded "Columbia" is spring-wheat flour?

A. That is the reason.

X Q. 45. You don't know, do you, who made the flour branded "Columbia" which is sold by the defendants, and where it was made?

A. No, sir.

X Q. 46. Have you ever personally tested that flour, to your recollection?

A. Yes, sir; I think I have.

X Q. 47. Are you absolutely sure that you did test it, so sure that you can recall the fact that you did test it?

A. Yes, I believe I have tested it.

X Q. 48. You say believe. Are you absolutely sure you did?

A. When a man believes that he has done anything, that is all he can say. I believe that I have tested it.

X Q. 49. Do you recollect the circumstance of testing it?

A. No particular circumstance in relation to it.

X Q. 50. Nor the time, nor place in which the test was made?

A. If I tested it, it would be at my own store where it was.

X Q. 51. But you don't recollect any particular time and place at which you did so test it, do you?

A. No; I don't recollect any particular time that I tested it; I test all new brands that come into my store.

X Q. 52. Nor do you recollect any particular place at which you tested it?

A. If I tested it at all it would be at my own store.

X Q. 53. Without having any definite knowledge on the subject, is it your understanding or belief or impression that the flour of the defendants branded Columbia was made in Minneapolis, Minnesota?

247 A. I do not know where it was made.

X Q. 54. Have you ever sold the complainants' flour branded Columbia?

A. No, sir; I do not think I have handled that brand of Columbia; I have sold a great deal of it under the brand of Golden Rod.

X Q. 55. The usual method of branding flour is, I understand, to place the brand name across the centre of the head, the manufacturer's name at the top of the head, and the name of the place where the flour is made at the bottom of the head; is that correct?

A. That is the general style; there is always a great variety, but that is the general run of the style.

JAMES A. ALLEN, a witness sworn on behalf of the respondents, deposes and says:

Direct examination.

By Mr. ALCORN:

Q. 1. What is your business?
A. I am a stencil-cutter.
Q. 2. Do you cut stencils for barrel heads?
A. That at one time was my principal business; there are not so many cut now.
Q. 3. Look at the brand of the defendants' Columbia patent. Is that the usual method or form of branding flour?
A. What do you mean by the usual form?
Q. 4. The usual shape.
A. Yes, sir; only I do not consider it a very neat brand.
Q. 5. Is that done by stencil?
A. Of course; yes, sir.
Q. 6. How do stencils usually compare, one with the other, for barrels?

(Objected to, as incompetent.)

248 A. Stencils are generally different, but it is often the case that we duplicate brands. Take, for instance, the word best; I have cut as many as ten for different parties.
Q. 7. I do not mean the brand name; I mean the character of the letters.
A. They generally run the same; yes, sir; about the same as that (pointing to the defendants' brand).
Q. 8. Have you ever made a stencil with the name Columbia on it?
A. Yes, sir.
Q. 9. When?
A. Either in 1865 or 1866, I cannot say positively which.
Q. 10. For what length of time after that did you make a stencil with the brand Columbia in it?
A. I left New York in 1868 and went West; after that I did not make the stencil for the Columbia mills. I don't know what became of them after that, but the mill is still there.
Q. 11. For whom was that brand with the word Columbia in made?
A. It was made for the Columbia mills; I do not remember whether Mr. Lee was the owner of the mill, but Mr. Lee and Mr. Hollingsworth were the owners.
Q. 12. Who gave you the order?
A. Mr. Hollingsworth gave me the orders.
Q. 13. Where is that mill located?
A. The mill is at the foot of Atlantic street, Brooklyn, New York.

Cross-examined.

By Mr. STRAWBRIDGE:

X Q. 14. Do you mean to say that the brand Columbia was made by you for a brand of flour?

A. Yes, sir.

— Q. 15. Please draw on a piece of paper a representation of the stencil of the brand you made at that time, giving all the words, letters or symbols contained in such stencil?

A. It is a pretty long while ago, but I think I can give pretty near it. (Drawing is attached hereto.)

(Here follows diagram marked p. 249.)

250 X Q. 16. In what month and year was that stencil made?

A. Either in 1865 or 1866.

X Q. 17. For whom was it made?

A. It was made for the Columbia mills, of Brooklyn; Mr. Richard C. Lee left Philadelphia and took that mill, I think.

X Q. 18. Who owned it?

A. Mr. Lee and Mr. Hollingsworth owned it, I think.

X Q. 19. Are either of those gentlemen alive?

A. I do not know.

X Q. 20. Where did Mr. Hollingsworth live the last time you saw him?

A. I have not seen him since the earlier part of '67 or '68.

X Q. 21. Where did Mr. Lee live?

A. I have not seen him; I saw him in his office.

X Q. 22. The order for that brand was given by Mr. Hollingsworth?

A. Yes, sir.

X Q. 23. Who were present when the order was given?

A. I do not know who was present; I made a dozen different brands and submitted them before they were cut.

X Q. 24. At that time were you in business?

A. No, sir; I was not in business; I was foreman of another company.

X Q. 25. What was the name of that company?

A. The Stafford Manufacturing Company.

X Q. 26. Where is its place of business?

A. No. 66 Fulton street, N. Y.

X Q. 27. Who were the officers of that company?

A. Arthur Stafford was at the head; he is now at 35 Beekman street, N. Y.

X Q. 28. What is his present business?

A. Stencil business.

X Q. 29. Who were the other partners at the time you made that stencil?

A. H. N. Stafford and Nelson Stafford.

251 X Q. 30. Who else?

A. That's all.

Columbia Mill Co.
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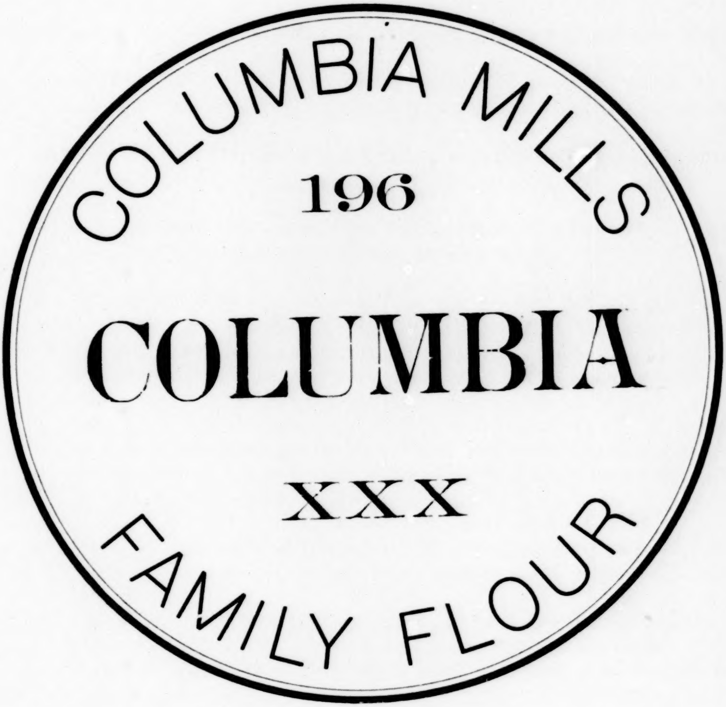

X Q. 31. Where are they?

A. The old gentleman is too old to do anything.

X Q. 32. Where does he live?

A. He is living in Brooklyn; Nelson Stafford is still at the old place, No. 66 Fulton street.

X Q. 33. What business is he in?

A. He is still in the same business.

X Q. 34. For whom did you cut this stencil?

A. For the firm.

X Q. 35. How many other stencils like the one you have drawn did you cut for that firm?

A. I do not know how many; I believe I have cut more than one that was their brand; I believe you can get that brand at the Columbia mills to-day.

X Q. 36. Do you know what kind of wheat they used in making flour?

A. I do not.

X Q. 37. Where is the mill located that uses this brand?

A. At the foot of Atlantic avenue, in Brooklyn.

X Q. 38. Which ferry is that?

A. Hamilton or South; the mill is just as you get off the boat.

X Q. 39. Did the Stafford Company, at the time this stencil was made by you, keep books recording the stencils made by them?

A. I don't believe they did this, because it was a peculiar job.

X Q. 40. What was the peculiarity?

A. Because I had done work for Mr. Hollingsworth in Philadelphia, and he hunted me up in New York and gave me the job, and I got a commission. He was a man that had very fancy brands, and I got as much as $10 or $15 for a brand.

X Q. 41. Who was present when you made that stencil?

A. I could not tell you; I had a man and a boy under me.

252 X Q. 42. What were their names and where did they live?

A. I could not tell you without looking over the firm's books.

X Q. 43. Do you know where those books are at this time?

A. I do not know that they have any; the firm was wound up fifteen years ago.

X Q. 44. Can you give me the names of the persons who were working with you at that time?

A. I can give you —— Vennables.

X Q. 45. Do you know where he works or lives?

A. That I cannot tell you.

X Q. 46. Where have you been since then?

A. In St. Louis in 1868; in Cincinnati the same year, and in Chicago; I left Chicago in '68, and from there I went to St. Louis, and stayed there about four years, and then went to Cincinnati.

X Q. 47. Where have you been since you left St. Louis?

A. Here in Philadelphia, on Arch street, below Third; I have been thirty-six years cutting stencils.

X Q. 48. How many years were you in Brooklyn in that business?

A. About one year at one time and four or five months at another.

X Q. 49. What time was it you were there a year?

A. 1865 or '66, I will not be certain which.

X Q. 50. What time was it you were there for a month or two?

A. In 1868 or towards the last of 1867.

X Q. 51. You have no personal knowledge what was done with those stencils by Hollingsworth and Lee, after you made them?

A. Hollingsworth and Lee made a great number of brands for the South American ports.

X Q. 52. You have no personal knowledge what they did with the stencils, have you?

253 A. No, sir; I could not tell you.

X Q. 53. For all you know, Hollingsworth and Lee might have placed those stencils upon muslin or anything else.

A. They might have doubled them up and thrown them overboard.

X Q. 54. In other words, after you delivered this stencil to Hollingsworth and Lee, you had no further knowledge of it, is that so?

A. Yes, sir; I don't know what they did with any of their brands.

X Q. 55. Can you give me the name and address of a single person who saw you make this stencil?

A. Yes, sir; but I don't know whether the person would remember it. Arthur Stafford, 35 Beekman street. Of all the plates I made for Hollingsworth and Lee, I don't believe he could go back and tell you anything about them.

X Q. 56. You cannot give me the name of any person that you know who saw you make that stencil?

A. No, sir; I am making a stencil, in my place to-day, and I could not give you the name of anybody who saw it, and there are several people there. A man could cut six brands and not know what was on them.

X Q. 57. After you came back to Philadelphia, did you make any stencil for Hollingsworth or Lee?

A. I have not seen either of them since I left New York.

X Q. 58. Have you any memorandum or any record of any account by which you fix the date at which you made this stencil?

A. The only record, that I went to New York and left my place here in charge of a young man and was there probably four or five weeks when Mr. Hollingsworth came in and gave me his work.

X Q. 59. (Question repeated.)

A. I know it was either in 1865 or 1866.

X Q. 60. (Question repeated.)

254 A. I have none; no, sir; nothing whatever. I know just when I was in New York.

X Q. 61. Have you any book or record, showing when you arrived in New York and when you left there?

A. If I had my letters here I could fix the date from them.

X Q. 62. How did you convince yourself that you had been in business in 1865 or 1866?

A. I did not convince myself at all; I know when I went there.

X Q. 63. You have testified to-day, merely from recollection, without refreshing your memory as to when you had been there?

A. I know it; because I took a three months' old child with me.

X Q. 64. How many children have you?

A. I have one.

X Q. 65. How do you know the child was three months old when you went there?

A. Because she was born in 1865, and I know that in 1866 I left New York and went West.

(The witness has testified that he knows nothing about what was done with this stencil.)

By Mr. ALCORN:

X Q. 66. To what use could this stencil be put?

A. Only for marking barrels, of course.

(Question objected to.)

X Q. 67. What portion of the barrel was it intended to mark?

A. The head.

X Q. 68. Was it in the form that you have made here?

A. Yes, sir; I am pretty confident that it was.

X Q. 69. What is the difference between a stencil that would be made for a bag and one for a barrel?

A. A stencil for a bag is always made oblong.

255 X Q. 70. Could this brand have been used for a bag?

A. No, sir. It is too wide for a bag.

X Q. 71. Do you know General Lynch?

A. No, sir.

(Defendants' time for taking testimony is extended until Monday, January 28th, 1889.)

SAMUEL ALCORN, a witness sworn on behalf of the respondents, deposes and says:

Direct examination.

By Mr. ALCORN:

Q. 1. What is your business?

A. Flour commission business.

Q. 2. You are one of the defendants in the above case?

A. Yes, sir.

Q. 3. Of what firm are you a member?

A. William W. Alcorn & Co.

Q. 4. How long have you been a member of your firm?

A. Since March, 1884.

Q. 5. Prior to becoming a member of your firm, what connection did you have with the flour business?

A. I was associated with my father in the baking business.

Q. 6. When did you commence in the baking business?

A. I was born in it you may say.

Q. 7. When did you actually commence to work in the business?

A. I was about 14 years old.

Q. 8. How old are you now?

A. I am now 37 years past.

Q. 9. Are you familiar with the various brands of flour sold in this market?

A. I am.

256 Q. 10. What position in reference to the business do you occupy?

A. Seller of flour entirely.

Q. 11. Are you familiar with the methods of mixing, doughing and testing flour?

A. I am; yes, sir.

Q. 12. Can you distinguish the various kinds and grades of flour?

A. I think I can; yes, sir.

Q. 13. Have you been doing that for some time past?

A. I have.

Q. 14. For what length of time has the firm with which you are connected been established, and under what name?

A. They started under the name of Alcorn, Baker & Co. in 1868 or 1869; they continued in business until 1880; the firm after that was Alcorn, Smith & Co. up to 1883, then William W. Alcorn & Co.

Q. 15. Since you have been in the firm yourself, have you handled much or little flour?

A. Have handled considerable flour.

Q. 16. What are the yearly sales at the present time of flour made by your firm?

A. Sold by our firm. We don't make flour.

Q. 17. Sold by your firm.

A. 150,000 barrels a year; from 125,000 to 150,000 barrels per year.

Q. 18. Have you the brand known as Columbia patent?

A. Yes, sir.

Q. 19. What kind of flour is it which you have branded Columbia patent?

A. Spring wheat or Minnesota flour.

Q. 20. Do you use that brand of flour now?

A. No, sir.

Q. 21. What words composed the brand which you did use?

(Question objected to, as incompetent.)

A. High grade No. 1 hard wheat Columbia patent, 196, Minneapolis, Minn., in the lower circle.

257 Q. 22. Has it always been in that form?

A. No, sir.

Q. 23. What other?

A. Same form except in the lower circle was the word Minnesota.

Q. 24. By whom and where was the flour recently so branded, Columbia patent, made?

A. That was made by Edward Sanderson & Co., of Milwaukee, Wis. Mr. Sanderson is now president of the Minnesota Millers' Association, elected unanimously in December.

Q. 25. You say Minnesota millers. What do you mean?

A. I mean millers who grind flour out of hard spring wheat.

Q. 26. What is the name of the association?

A. Northwestern Millers' Association.

Q. 27. What kind of flour do Sanderson & Co. mill?

A. Spring-wheat flour.

Q. 28. How do you know that the flour which you brand Columbia patent is spring-wheat flour?

A. We can tell by the nature. Spring-wheat flour is flour that is made from wheat that was planted in the spring and harvested in the fall, grown all through the summer. Winter-wheat flour is flour that is made from wheat that is planted in October, grows through the winter and is harvested in May.

Q. 29. Can you tell whether a flour is spring or winter wheat?

A. By feeling it. Winter wheat is a dead white, and spring wheat is a cream color. If a family who had been using a winter wheat should get a barrel of spring wheat they would return it, thinking it was buckwheat. It is only within the last few years that families have come to understand how to work it right.

Q. 30. To whom do you sell flour?

A. Mostly to jobbers and to bakers. Our principal sales are to the wholesale trade.

Q. 31. In what quantities?

258 A. As a rule, in car-loads.

Q. 32. Since January 1, 1883, how many barrels of flour branded Columbia patent, has your firm sold?

A. 8,125 barrels, about.

Q. 33. All in barrels?

A. In barrels.

Q. 34. In that same time, how many barrels of spring-wheat flour, not branded Columbia patent, have you sold?

A. Over 300,000 barrels.

Q. 35. To what class of people, and to whom, and where, have you sold the flour branded Columbia patent?

A. The bulk of that flour was sold to William Titus, wholesale baker, Newark; Adam Turkes, wholesale baker, Newark; James Carroll, wholesale flour dealer, of Newark; P. P. & D. F. Runyun, wholesale flour dealer, of New Brunswick; J. B. Alcorn, baker, of Atlantic City; W. G. Valentine, wholesale flour dealer, of Wilmington; they got the bulk of the flour, three-fourths of it, anyhow. I also sold it to W. L. Gilbert, baker, of Wilmington; M. L. Dannenberg, baker, of Wilmington; J. G. Staib, baker, of Wilmington; Wm. R. Flynn, flour dealer, of Bordentown, N. J.; W. P. Eyre, flour dealer, of Chester; M. T. Staigerwalt, of Lancaster, Pa., and Charles Schwarz, Philadelphia, baker. Those are all I can remember.

Q. 36. Did or did not those parties purchase flour from your firm, before they received this flour branded, Columbia patent?

A. They did.

Q. 37. Do they still buy flour from your firm under other brands than Columbia patent?

A. They do.

Q. 38. Was this flour ever represented by you to the purchasers as made by the complainants?

A. No, sir.

Q. 39. Was it ever represented as being made in Minneapolis or Minnesota?

A. No, sir.

259 Q 40. Did anybody ever receive this flour from you, they asking for the flour of the Columbia Mill Company, branded Columbia?

A. Never.

Q. 41. Did any of the parties to whom your flour was sold, as above branded, ask you for the flour of the complainants, branded Columbia?

A. No, sir; I never knew they had a brand Columbia, until a year or so ago.

Q. 42. Did any of the parties who purchased your flour, ever buy the flour of the Columbia Mill Company, branded Columbia?

A. Several of them have, so I have found out since.

Meeting adjourned until Thursday, January 17, 1889, at 2.30 p. m.

260 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

COLUMBIA MILL COMPANY
vs.
WILLIAM W. ALCORN & CO. } In Equity.

PHILADELPHIA, *January 17th*, 1889—2.30 p. m.

ALBERT A. KEENE, recalled.

Direct examination by Mr. ALCORN:

Q. 1. How many mills by the name of Columbia are there?

A. I don't know how many; I only know of two.

Q. 2. Which are they?

A. The Columbia Mill of Minneapolis and the Columbia Mill of Columbia, Dakota.

Q. 3. Have or have not the Columbia Mill Company of Columbia, Dakota, a brand known as Columbia?

A. They have; yes, sir.

261 Q. 4. Do you know what kind of flour they make, whether spring or winter wheat?

A. Spring-wheat flour.

Q. 5. And to what kind of flour do they give the brand Columbia?

A. To their first patent.

Cross-examined.

By Mr. Strawbridge:

X Q. 6. How do you know there is a Columbia mill in Dakota?
A. I have been there.
X Q. 7. Where is this mill situated?
A. In Columbia.
X Q. 8. The town of Columbia?
A. Yes, sir; Brown county.
X Q. 9. By whom is it owned?
A. By a milling company called Columbia Mill Company.
X Q. 10. Do you know the name- of the officers or stockholders?
A. No, sir; I do not.

J. Westley Supplee, recalled:

Direct examination.

By Mr. Alcorn:

Q. 1. Do you know of any mills other than the complainants' in this suit who have a brand called Columbia?

A. Yes, sir.

Q. 2. Will you please state what mill?

A. Columbia city, Dakota, have a mill that has a brand Columbia, and I think I have seen one or two other Columbias around; that I cannot state where the mills are just now.

262 Q. 3. In your former testimony you stated that some of the Northwestern mills had the same brand name, will you please tell us what distinguishes one from the other?

A. By having the name of the mill or the miller's name on it; for instance "Gold Medal," we have Washburne's Gold Medal and Galaxy Gold Medal, which would distinguish the two different mills; those mills are both at Minneapolis; there are probably fifteen or twenty brands of Best used by different mills throughout the country; we would know that made by Pillsbury, because it would be designated on the barrel and by the trade generally as Pillsbury's "Best," the same way with "Success;" there are probably a dozen different brands through the country on which the mills brand "Success;" we would know that of Pillsbury's, because it would be branded and designated by the trade as Pillsbury's; the same thing would follow with "Superlative;" there are some fifteen or twenty brands of "Superlative;" we would know Christian's by the designation of Christian & Co.'s "Superlative," and we would know the Columbia Mill Company's "Superlative" by it being designated as the Columbia Mill Company's "Superlative." We bought flour from that mill called "Golden Rod;" there are several different mills that brand their flour "Golden Rod;" we would distinguish theirs as Columbia Mill Company's "Golden Rod," the same way with the brand "Columbia;" the trade would not know it under the name of "Columbia," but they would know it under the name of Columbia Mill Company's "Columbia."

Q. 4. If the trade were offered a brand Columbia, what would they conclude from that, nothing else being said?

A. The trade would hardly buy it unless it was by a sample.

Q. 5. Would they distinguish where that flour was made?

A. They would not distinguish where that flour was made.

263 Q. 6. Is or is not the brand of the Columbia Mill Company, known as Columbia, so well known in this market, that a salesman offering a brand as of the name of Columbia would designate the Columbia Mill Company's?

A. Not unless they would add Columbia Mill Company's Columbia.

SAMUEL ALCORN (continued):

Direct examination.

By Mr. ALCORN:

Q. 44. Which of the brands, whether the Columbia Mill Company's Columbia or your Columbia patent, was first purchased by these parties?

A. With the exception of three or four purchasers, our flour was the first.

Q. 45. How many of these purchasers purchased also the brand of the Columbia Mill Company branded Columbia?

A. Henry Leifke, of Plainfield, N. J.; M. L. Danenberg, Wilmington, and W. L. Gilbert, of Wilmington; J. G. Staib, of Wilmington, purchased the Columbia Mill Company's flour, but bought ours before they bought theirs.

Q. 46. Which of the flours did the other three buy the first?

A. That I don't know.

Q. 47. Was your flour, Columbia patent, the first flour purchased by any of these parties from your firm?

A. Yes, sir.

Q. 48. Was that brand the first flour which they had purchased from your firm?

A. No, sir.

Q. 49. Had or had not these parties been dealing with you prior to receiving the Columbia patent?

A. Yes, sir; they purchased other flours first from us.

Q. 50. (Question repeated.)

A. Before, yes, sir.

264 Q. 51. How long before purchasing Columbia patent had they been customers of yours?

A. Some of them, I guess, probably for eight or ten years.

Q. 52. What representations were made by you or by your salesmen in selling the flour branded Columbia patent?

A. The flour was sold by sample as a spring-wheat flour strictly on its merits.

Q. 53. Was or was not any representation made as to the millers or as to the place it was made?

A. No, sir.

Q. 54. When did you learn that the Columbia Mill Company had a brand Columbia?

A. As near as I can recollect I think it was in the latter part of the summer of 1887.

Q. 55. How long ago was that?

A. That was about one year and a half ago.

Q. 56. Was that before or after you had branded your flour Columbia patent?

A. That was after.

Q. 57. In selling your flour, Columbia patent, have or have not your firm come in competition with the flour of the Columbia Mill Company branded Columbia?

A. I never had the flour of the Columbia Mill Company thrown down to me as a competing flour; by that I mean that it was never quoted as a price to me, or as a standard.

Q. 58. How many brands of spring-wheat flour have you?

A. Twenty-five.

Q. 59. Under how many brands do you sell this same flour branded Columbia patent?

A. Four.

Q. 60. Name those brands, please.

A. Diamond A, Saratoga, Imperial, White Swan.

Q. 61. Under what brands do you now sell it?

A. Under those brands last mentioned?

265 Q. 62. To whom does the brand Columbia patent which you use belong?

A. To William W. Alcorn & Co.

Q. 63. When did you cease to use the brand Columbia patent?

A. Either in June or July, 1888; my brother and I came to the conclusion that as there was no value—not five cents' worth—in the brand to us, and our counsel having been led to suppose that if we stopped using this brand that was all the Columbia Mill Company wanted, we agreed to do it voluntarily of our own will, still not conceding to them the exclusive right to use it.

Q. 64. Was this before or after the application for an injunction?

A. This was after.

Q. 65. Was it before or after the hearing for the application?

A. After the hearing.

Q. 66. And why did you stop using it?

A. Because Mr. Gunckel, the attorney for the Columbia Mill Company, led our counsel to believe that if we stopped using the brand that was all they wanted, and they would stop the expense of a big lawsuit; and as there was no value to us in having that brand, we came to the conclusion to drop it.

Q. 67. And have you used it since then?

A. No, sir; but while we have not used it since then, we do not believe that they have the right, to the exclusion of all of us, to use that brand.

Q. 68. You said that you had sold 8,125 barrels branded Columbia patent, and that some were branded Minnesota and some

Minneapolis, Minn. How many were there of each of these brands?

A. Three thousand five hundred were branded Columbia Patent Minnesota, and 4,625 were branded Columbia Patent Minneapolis, Minn.

Q. 69. Why do you put on your barrel head Minneapolis or Minnesota?

266 A. Because Minneapolis and Minnesota are used by the trade to designate spring-wheat flour, and one is just as good to us as the other.

Q. 70. Are you acquainted with the mills of Minneapolis?

A. Yes, sir; some of them.

Q. 71. Do you know the brands which they have?

A. Some of their brands; yes, sir.

Q. 72. Are you acquainted with the spring-wheat mills outside of Minnesota?

A. Yes, sir; some of them.

Q. 73. Do you know the flour of the complainants?

A. I know some of their brands; yes, sir.

Q. 74. Have you ever purchased any of their flour?

A. We have.

Q. 75. Under what brand name?

A. Way Ahead, Best, Superlative, American, Diamond A. M.

Q. 76. Do all of these contain the name Columbia Mill Company?

A. No, sir.

Q. 77. Which do not?

A. Diamond A. M.

Q. 78. What was on the barrel head containing the Diamond A. M.?

A. Nothing but a diamond and the letters A. M., shape of a diamond.

Q. 79. Did you ever purchase the brand Columbia?

A. Never.

Q. 80. Do you know of any other brands which they manufacture which are sold in this market?

A. They make a flour which they brand Golden Rod, but I don't think there is any of it sold here any more.

Q. 81. Who makes the brand known as Luxury?

A. The Columbia Mill Company make it for the F. Baker Milling Company.

Q. 82. What is on the barrel head?

267 A. At the top of the barrel are the words F. Baker Milling Company; the word Luxury across the centre; I think it is put on in the shape of a cross.

Q. 83. Does the word- Columbia Mill Company appear upon the barrel head?

A. No, sir.

Q. 84. Where is the F. Baker Milling Company?

A. On Ninth street, below Girard avenue, Philadelphia.

Q. 85. What is the custom of the trade and of the mills in the

Northwest in branding their flour to designate it as spring-wheat flour?

A. Put the words Minneapolis or Minnesota on.

Q. 86. Do you know of any flours not made in Minneapolis that have upon them Minneapolis?

A. Yes, sir.

Q. 87. What are the names of those flours?

A. James A. Dudley & Son's Pure Gold, made by Cargile and Falls, Huston, Minnesota; Matthew Gregson's Best, made at Austin, Minnesota.

Q. 88. What flours do you know made outside of Minnesota that have upon the barrel Minneapolis or Minnesota?

A. A. A. Freeman & Co.'s La Crosse, Wisconsin; Freeman, Ruiter & Co., La Crosse, Wisconsin; Bernhardt Stern, Milwaukee, Wisconsin, and the mills around Buffalo, New York, all use it.

Q. 89. What do the trade understand by these words upon a barrel head?

A. That it is a spring wheat.

Q. 90. And where are spring-wheat flours made?

A. In Minnesota, Dakota, Wisconsin, Nebraska, Kansas; Detroit, Michigan; Buffalo and Rochester, N. Y.

Q. 91. Why does Minneapolis, Minn., designate spring-wheat flour?

A. Because it is made out of hard spring wheat and because they are the head centres of the milling of that kind of flour.

268 Q. 91½. Do you know any brands in which the word Columbia appears other than those of the complainants and respondents?

A. Yes, sir.

Q. 92. Name those brands.

A. Columbia Mill Company, of Columbia, Brown county, Dakota; Columbia Elevator and Grain Mills, of Providence, Rhode Island, and the Columbia Mill Company, of Oakland, Indiana.

Q. 93. Do you know how long any of those mills have used the brand Columbia?

A. The Columbia Grain Elevator Company, of Providence, started in 1877, the Columbia Mill Company, of Brown county, Dakota, started in 1882.

Q. 94. For what length of time, do you know, that they have used that brand?

A. Long before the Columbia Mill Company, of Minneapolis, was in existence.

Q. 95. Whose brand is this?

A. S. S. Sprague & Co., of Providence, R. I.

Q. 96. (A brand marked 196 Minnesota, under that the word Columbia, then under that the word Haxall, shown witness, and he is asked whose brand that is.)

A. S. S. Sprague & Co., of Providence, Rhode Island.

Q. 97. What is the custom of the mills in branding flour for their customers?

A. Any mill will put on whatever a buyer wants put on a barrel head.

Q. 98. How do you sell the flour?

A. By sample.

Q. 99. How was your flour branded Columbia patent sold?

A. By sample. People not knowing the brand until after they had purchased the flour.

Q. 100. How are the spring-wheat flours designated here upon the market in quotations?

A. As Minnesota patents.

Q. 101. Do you know Mr. Horace S. Wade?

269 A. I do.

Q. 102. Mr. Wade in his examination says that he called upon you in reference to this brand and requested you to stop using it, and that after some conversation you agreed to do it; is that so?

A. I deny that.

Q. 103. Did Mr. Wade ever call upon you?

A. He called once when I was there in reference to this matter.

Q. 104. Will you please tell us what took place at this interview?

A. We told him that if they could show us by what right they had the exclusive use of this brand we would certainly stop; and we also told him we would not introduce that flour under that brand to any one only those parties who were using it at that time; so we told him.

Q. 105. Have you introduced it to any other parties since that time?

A. Not since that time; we have been giving it only to parties that had been getting it previous to his calling.

Q. 106. Do you know of any occasion or reason for the allegation that your brand interfered with the complainants?

A. No, sir; I think, if anything, it was on the contrary, as we claim to have more of a reputation in this part of the country than the Columbia Mill Company, so that if anybody was going to suffer, it would be us, and I might say, that this is one of the reasons why we stopped, because we would have more to fear from their flour being taken for ours than for our flour being taken for theirs.

Q. 107. Do you know of any actual case in which their flour was taken, supposing it to be yours, or which your flour was taken supposing it to be theirs?

A. No, sir.

Q. 108. In keeping your accounts or making your sales or in sending your bills, how do you designate the flour?

A. By the name we give it.

(The witness desires to make a correction of the testimony of the last meeting.)

270 I said that Mr. Sanderson was elected president of the Northwestern Millers' Association. I wish to call your at-

tention to an article in a Chicago newspaper, where it says, "The Minneapolis millers, determined to form a public association, for private gain, at a meeting in Milwaukee, they endeavored to persuade doubting Thomases to unite with them." It was over this meeting that Mr. Sanderson was elected president. It comprised the spring-wheat mills over all the United States.

Cross-examination.

By Mr. STRAWBRIDGE:

X Q. 109. What personal knowledge have you of the use, by the Columbia Mill Company, of Columbia, Brown county, Dakota, of the brand Columbia?

A. They informed us that they did.

X Q. 110. And that is the only knowledge you have on the subject?

A. Yes, sir.

X Q. 111. What personal knowledge have you of the Columbia Elevator and Grain Company, of Providence, Rhode Island, having used the brand Columbia?

A. They wrote us and told us so and sent us a copy of their brand.

X Q. 112. And that is the only knowledge you have on the subject?

A. Yes, sir; the only knowledge that we have that the Columbia Mill Company made flour, is that they said so.

X Q. 113. What personal knowledge have you that the Columbia Mill Company, of Oakland, Indiana, use a brand Columbia?

A. They informed us by letter.

X Q. 114. And this is the only knowledge you have on the subject?

A. Yes, sir.

X Q. 115. What personal knowledge have you that S. S. Sprague & Co. use the brand Columbia on flour?

271 A. By letter; they also stating that they used that brand since 1877, and also, from a gentleman who sold the flour branded Columbia for them.

X Q. 116. You mean he told you so?

A. Yes, sir.

X Q. 117. And that is all the information you have about that matter?

A. Yes, sir.

(Counsel for the complainants objects to the testimony of this witness as to the use of the brand "Columbia" by the Columbia Mill Company, of Columbia, Brown county, Dakota, by the Columbia Elevator and Grain Company, of Providence, Rhode Island, and by the Columbia Mill Company, of Oakland, Indiana, and by S. S. Sprague & Company, of Providence, Rhode Island, for the reason that said testimony is incompetent, he having testified as to having no personal knowledge of the subject.)

Meeting adjourned until Friday, January 25th, at 11.30 o'clock, at the office of A. B. C. Salmon, Newark, N. J.

Mr. Alcorn offers in evidence:
Brand of respondents.
Brand of "Minnesota Columbia Haxall."
Brand of Jas. Dudley & Co., "Pure Gold, Minneapolis."
Brand of W. Listman, "Marvel, Minnesota."
"Northwestern Miller," Nov. 16, Dec. 21, 1888, and Jan. 20, 1889.
"Evening Bulletin," of Philadelphia, Jan. 16, 1889.
Circular, William W. Alcorn & Co.

(Mr. Strawbridge objects to the above offers, as being incompetent and irrelevant.)

Testimony on the part of the respondents, taken before A. B. C. Salmon, special examiner in the above-entitled cause, January 25, 1889.

272 STATE OF NEW JERSEY, }
County of Essex. }

Depositions of Adam Turkes and Andrew J. Liebhauser, taken before me, A. B. C. Salmon, a notary public in the county and State aforesaid, by consent of parties, in an action pending in the United States circuit court, eastern district of Pennsylvania, wherein The Columbia Mill Company is complainant and William W. Alcorn *et al.* defendants, this twenty-fifth day of January, 1889, at my office, No. 800 Broad street, Newark, New Jersey, complainant being represented by *his* counsel, William C. Strawbridge, Esq., and defendants by their counsel, James Alcorn, Esq.

And thereupon the following proceedings were had:

ADAM TURKES, a witness produced on behalf of respondents, being by me duly sworn, testified to the truth, the whole truth and nothing but the truth, in answer to interrogatories proposed to him as follows:

Direct examination.

By Mr. ALCORN:

Q. Mr. Turkes, what is your business?
A. Baker.
Q. And where is your place of business?
A. 468 Springfield avenue, Newark.
Q. What amount of business do you do, about?
A. We use about two hundred barrels of flour a week.
Q. Do you know William W. Alcorn & Company, the defendants?
A. Yes, sir.
Q. Do you buy flour from them?
A. I do.

Q. You are buying flour from them now, are you?

A. Yes, sir.

Q. Do you know the Columbia Mill Company of Minneapolis?

A. I do not.

273 Q. Did you ever buy any flour from the Columbia Mill Company of Minneapolis?

A. No, sir.

Q. Do you know J. C. Smith & Company of Newark?

A. I do.

Q. Did you ever buy any flour from J. C. Smith & Company?

A. Not flour—rye flour. I have bought rye and grain and wheat; never bought any patent flour of them as I know of.

Q. Did you ever buy from J. C. Smith & Company a brand of flour known as "Columbia"?

A. No, sir.

Q. Did you ever buy from Alcorn & Company a brand of flour known as "Columbia patent"?

A. Yes, sir.

Q. Do you know when you bought that?

A. Well, some time last year; I couldn't say exactly; off and on I bought quite some of it; think I had four or five cars or more.

Q. Had you bought any flour from Alcorn & Company before getting the Columbia patent?

A. I had.

Q. When you bought the flour branded "Columbia patent," did Alcorn & Company represent to you that it was made by the Columbia Mill Company?

A. They did not.

Q. Did you ever say to J. C. Smith & Company that Alcorn & Company had represented it as the Columbia Mill Company's flour?

A. Not as I know of.

Q. Can you distinguish between spring and winter wheat flour?

A. I should say so.

Q. You are a practical baker yourself?

A. Yes, sir.

Q. What kind of flour was the flour branded "Columbia patent" which you received from Alcorn & Company?

274 A. Well, it was a plain black brand; all one color.

Q. What kind of flour was the flour that was in the barrel?

A. That was spring Minnesota hard wheat. I had a sample of it; Mr. Alcorn sent me a sample of the flour, and we tested it, and on that ground I bought it, not on account of it being "Columbia" or anything else.

Q. And was it represented to you by Alcorn & Company as made at any particular place?

A. Not at all; I don't know where it was made.

Q. You don't know where it was made?

A. No, sir.

Q. What did the brands on the barrel head, "Minneapolis" or "Minnesota," denote to you?

A. I don't know; I didn't take notice.

Q. You didn't take notice?

A. No, sir; I also got some in sacks.

Q. Under what name do you buy flour from them now?

A. I don't know; I am getting a lot now in sacks, I think.

Q. You don't know what it is branded?

A. I don't know what it is branded; we get samples, and of course are supposed to get the articles like the samples.

Q. Is that your usual method of buying flour?

A. Yes, sir.

Q. By sample?

A. Yes, sir.

Q. You know the brand of Alcorn & Company, "Columbia patent;" you have seen that brand?

A. Oh, yes; I have got it.

Q. And have you seen the brand of the Columbia Mill Company, "Columbia"?

A. No, sir; I never had it.

Q. Haven't you seen the brand?

A. I saw it to-day.

Q. You saw it to-day?

A. Saw it to-day for the first time.

275 Q. When you saw those two brands—you saw the two brands together to-day, did you not—and when you saw the two brands, Mr. Turkes, were they similar brands?

A. They didn't look like one another; the "Columbia" letters were in red, and the Alcorn Columbia is all in black letters.

Q. If you desired to buy the Columbia Mill Company's brand which you saw to-day would you be deceived by the brand of Alcorn into buying the Columbia Mill Company's?

A. Well, I don't buy any flour because it has got a certain brand, for I want to test it; we don't buy flour because it comes from that or that mill; we want to see the goods when we buy. Mr. Alcorn has been in the habit of sending me samples every week, and prices, and the name I never cared much about; it is the article we test, and if it is satisfactory and the price all right we buy it; that is the way I generally buy my flour.

Q. Mr. Turkes, there are the two brands (showing witness two barrel heads); this is the black brand (pointing), which is the brand of Alcorn & Company, and this is the brand of the Columbia Mill Company (indicating). By looking at those two brands do you think they would mislead you?

A. I never saw this brand (indicating Columbia Mill Company red brand).

Q. You never saw it; but I mean would this—looking at the two brands—are they similar? Do you think they are similar?

A. I should not think so.

Q. Do you think they would be inclined to mislead you?

A. Oh, no; I didn't buy that flour because it was "Columbia;" I didn't buy on the strength of the brand or the mill; we don't buy in that way, as I said before. Mr. Alcorn sends me a sample almost every week, and we test it, and if it is satisfactory we buy it; we sometimes buy in sacks without any brands on at all. In fact, this Mr. Smith—I have not seen him, Mr. Smith, himself, I don't believe, in five years—his agent comes there selling to us.

276 ANDREW J. LIEBHAUSER, a witness produced on behalf of the respondents, in answer to interrogatories, testified as follows, at his place of business, No. 115 Bowery street, Newark, N. J.:

Direct examination.

By Mr. ALCORN:

Q. What is your business, Mr. Liebhauser?
A. Baker; wholesale and retailer baker.
Q. And your place of business, what is this?
A. 115 Bowery street; at that time it was 281 Plane street.
Q. You are now at 115 Bowery?
A. Yes, sir.
Q. You were before?
A. At 281 Plane street, Newark.
Q. What business do you do; would you mind telling us the amount in barrels?
A. About in the neighborhoood of forty barrels a week.
Q. Do you know Alcorn & Company, the respondents?
A. I don't know them any more than I hear; that is all.
Q. Did you ever buy any flour from them?
A. No; not direct from them.
Q. Do you know the Columbia Mill Company?
A. I know the flour.
Q. You know their flour?
A. Yes.
Q. Do you know J. C. Smith?
A. Yes, sir.
Q. Have you purchased flour from J. C. Smith?
A. Yes, sir; use a good deal of that Columbia.
Q. Have purchased flour branded "Columbia"?
A. No, sir; not branded "Columbia Mill Company."
Q. What was the name on the barrel head of such?
A. That is about all I know, "Columbia mill;" I seen the brand a while ago, and don't know any more than Columbia Mill Company.
277 Q. Did you purchase a flour branded "Columbia patent"?
A. Yes; I purchased a brand called "Columbia patent."
Q. From whom did you buy that?
A. Well, I was thinking over this thing; I don't want to make any mistake about my evidence; at that time, the day Mr. Alcorn was here before, I didn't give it any attention, but I have looked the thing more to-day, ever since he has been here this morning; I just set down and considered over it; at the time I purchased that Columbia flour, that is, of that dark-colored brand, I

had been using the Columbia mill, and I forget really what I was paying for the Columbia-mill flour at that time; if I knew about what time that I got that Columbia mill dark-brand Columbia, I could see what I was paying for Columbia mill; I think Mr. Carroll told me he had Columbia that he could sell me for so much money; I know it was about twenty-five or fifty cents less than I had been paying for the Columbia-mill flour I had been getting of J. C. Smith at that time; that is, I was using spring-wheat flour at the time, getting spring-wheat flour of Carroll and spring-wheat flour of Smith; I did really buy it, thinking it was as good a flour as the Columbia-mill flour; I thought it was a flour that come from the same mill, but under a different brand, but after I had seen the flour I was satisfied it was not the same flour.

Q. Who sold you the flour?

A. James Carroll.

Q. And did you tell J. C. Smith & Co. that it was represented to you as the flour of the Columbia?

A. I told him I had just as good a Columbia flour as his was; Smith come over there, and I told him you thought that was the only Columbia flour. "Oh," I says, "you haven't got the only Columbia flour in this country; anybody else can get Columbia flour, too." "Yes," he says, "of course." I know there was quite a little rumpus about it. He came over and got samples of the flour, and took one of the brands away; he asked me if I would give him one of the heads, and I said "Yes, take one," and it kind of 278 dropped at that; then, along came Mr. Carroll and wanted to know if I wanted some more; I told him no. I didn't like the flour, and I commenced using Mr. Smith's Columbia flour again.

Q. Did you ever say to Mr. Smith that Mr. Carroll represented it to you as the flour made by the Columbia Mill Company?

A. I can't really say; he said it was Columbia flour made in Minnesota; I forget whether the black brand is branded "Minnesota;" that is how the flour was sold to me. Columbia-mill flour, branded "Minnesota;" I am satisfied it was not the same flour, or the same mill; I am satisfied of that.

Q. Did you notice the barrel head when the barrel came?

A. Yes; I noticed it right away.

Q. Was it the same as the other?

A. No; it was not the same.

Q. That was not the same as the Columbia-mill barrel?

A. No.

Q. And you say you bought it thinking it might have been another brand of theirs?

A. I thought that it might have been the same flour put up in another barrel; I thought that the mill might have changed its brand, as is often the case; I thought they might have changed the brand, made it a different color, cheaper or quicker, or something in that way.

Q. You don't recall any of the brands under which you had bought the flour from J. C. Smith & Company, do you; any of the brand names?

A. Whenever he sold me Columbia flour I always got the Columbia flour branded with the Columbia mill, the Columbia-mill brand, but of course he had other flours that he was selling which I understood was the same flour under different brands, but then of course I didn't buy it for that brand.

279 Cross-examination.

By Mr. STRAWBRIDGE:

X Q. You have spoken of having had a conversation with some person this morning. Do you mean Mr. Alcorn the gentleman here present, one of the defendants in this case?

A. Yes, sir. Not long after that there came a lawyer to see me who represented that Columbia mill—after that there came a lawyer, he told me, from Minneapolis, representing that Columbia mill, and he just merely came in and asked me if I ever bought any flour of Mr. J. C. Smith branded "Columbia-mill flour." I said, "Yes; I have used that flour." He asked me about this. I don't know whether he asked me about this other flour or not; then he asked me where Mr. Carroll lived; that is the only thing I heard about it until Mr. Alcorn came to see me about two weeks ago.

X Q. How long has it been since this gentleman from Minneapolis was here?

A. It must have been somewhere about a year ago, I guess.

X Q. You have not seen him since?

A. I don't know really whether it was a year ago or was it last spring.

X Q. You have spoken in your testimony of a Mr. Carroll. Is he the gentleman who sells the defendants' flour in this city?

A. I believe he does; I often heard him tell he had flour from Alcorn.

X Q. And the defendants' flour bought by you was purchased from him, Carroll?

A. The flour bought from Mr. Carroll was bought of Alcorn; I didn't know where the flour came from.

X Q. You have mentioned J. C. Smith; is he the person who sells the complainants' flour in this city; I mean the Columbia Mill Company flour?

A. He is the man that sells the Columbia Mill Company flour in the whole State.

280 X Q. And from whom you bought the Columbia-mill flour?

A. That is the man; yes, sir.

X Q. When you purchased the Columbia flour from Mr. Carroll, which was made by Alcorn, what made you think that it was the same flour as you had been purchasing under the name of "Columbia" from Smith?

A. Because it was Columbia; because it was branded, "Columbia;" it was the flour I had been using right along, Columbia, and

I thought as long as you have got that flour, I might as well buy it of him; of course, after I opened the flour I could tell it was not the same flour and was a different manufacture. A mill, of course, perhaps, makes four or five different grades of flour. First, second and third, and sent out sometimes brands of the same flour under different heading, and when a dealer gets the use of a brand he wants, he doesn't allow any one else to handle that brand in that district.

X Q. Did you find the flour that you purchased from Mr. Carroll, as good in quality as the flour which you were purchasing from Smith?

A. I did not. I didn't think it was equally as good; of course, it didn't cost as much; it didn't cost as much money, but I thought it was the same flour before I opened it, before I had received it; but after I opened the flour I knowed it wasn't the stock; then I don't remember whether I had the second or third lot; I couldn't tell; I know it was one lot of fifty barrels I had, or seventy-five; I don't know did I get a second lot of that or not; I don't remember; if I did, I stopped after the second lot.

X Q. You say you had a conversation with Mr. Alcorn, the defendant in this case, this morning, and that you also had a conversation with him about two weeks ago. Did you have any other conversations with him before giving your testimony in this case?

A. I never saw the gentleman before, not in three or four years, I guess, until two weeks ago.

281 X Q. And you have not had any conversation with anybody in regard to this case, or this flour in controversy, between the time that the gentleman from Minneapolis was here to see you and the time that Mr. Alcorn spoke to you, about two weeks ago, have you?

A. Oh, yes; I did have a conversation about that, come to think, with Mr. Smith, one time up in my place; he said there was going to be some trouble about it; that was after the lawyer had seen me, and he said he was going to bring these parties up and make them stop.

X Q. How long ago do you think that was?

A. That was some time after I saw this lawyer.

X Q. Nearly a year ago?

A. I don't know but what we might have often talked about it, we talk upon so many subjects concerning flour; but I know we did have one or two slight conversations in regard to that flour at that time; he told me there was going to be some trouble—"he would stop people running on his territory selling minor goods for his." I guess that must have been along the early part of last summer.

X Q. Has anybody talked with you about this case except Mr. Alcorn lately?

A. No, sir; nobody at all.

I, A. B. C. Salmon, a notary public of New Jersey, hereby certify that Adam Turkes and Andrew J. Liebhauser were examined and

cross-examined in the above-stated cause at Newark, N. J., on the twenty-fifth day of January, ostensibly before me, but by consent of counsel the testimony of said witnesses was taken by a stenographer in my absence; that it was further consented between counsel that the testimony should be thus taken stenographically and afterwards transcribed and submitted to the witnesses for their signature; that the testimony hereto annexed was so taken and transcribed and presented to said witnesses respectively; that the said witness
282 Adam Turkes was by me duly sworn, and in my presence subscribed to his deposition above -et out ons this twenty-sixth day of January, A. D. 1889; and that the said witness Andrew J. Liebhauser refused to sign said deposition or to be further annoyed in the matter, unless paid for his time.

I hereby further certify that the stenographer employed to take his said deposition is a competent stenographer, and that the testimony so taken by him of said witness is undoubtedly correctly taken and transcribed as above, which more fully appears by the affidavit of said stenographer hereto attached.

STATE OF NEW JERSEY, } *ss:*
County of Essex,

J. R. Salmon, being duly sworn on his oath, says:

That he is and has been engaged in the stenographic profession for several years as a law and general stenographer, and that the evidence above taken, especially that of the witness Liebhauser, is accurately and correctly taken and transcribed as above appears; that the witness Liebhauser told this deponent that his time was too valuable to be annoyed by this matter, and that he would not take the time to either read, listen to the reading of or sign said deposition, unless compensated for his time.

Sworn and subscribed before me, A. B. C. Salmon, notary public of New Jersey, this twenty-eighth day of January, 1889, at Newark, N. J.

—— ——,
Notary Public.

283 APPENDIX.

Affidavit of John George Staib.

STATE OF DELAWARE, } *ss:*
County of New Castle,

John G. Staib, *who* being by me duly sworn, deposes and says:

That he is a baker, doing business at No. 314 Market street, Wilmington, Delaware. That he buys flour from William W. Alcorn & Company; that he has purchased flour from them branded Columbia patent. That the said flour was not represented as the flour of the Columbia Mill Company of Minneapolis, and was not purchased by this deponent as such flour. That he was not induced to buy it supposing it to be the flour of the Columbia Mill Company. That in his judgment the Columbia patent purchased from William

W. Alcorn & Company is as good as any spring-wheat patent he has bought. He has used the flour of the Columbia Mill Company and knew when he purchased Columbia patent from William W. Alcorn & Company that he was not purchasing the flour of the Columbia Mill Company. Further, deponent says that to the best of his knowledge he purchased the Columbia patent from Alcorn & Company before he bought the Columbia flour from Linnard and Gibbs. Further, deponent says, that *that* one P. H. Gunckel representing himself as the attorney for the Columbia Mill Company, accompanied by one H. B. Delaney, a salesman in the employ of Linnard and Gibbs, did call on deponent and did try to secure an affidavit from deponent stating that he was deceived in buying said flour from Alcorn & Company, which he declined to do, stating that he was not deceived, and that the flour was as good as any flour he ever had. Deponent is shown a copy of an affidavit with his 284 signature thereto which says he was deceived into purchasing this flour thinking it was the flour of the Columbia Mill Company.

Deponent did sign an affidavit supposing that it only contained the statement that he had bought flour from Alcorn & Company branded Columbia patent. The facts contained in the said affidavit are not true, and my signature was obtained to it through a false statement as to its contents.

(Signed) JOHN GEORGE STAIB.

Sworn and subscribed to this seventh day of May, A. D. 1888.

HENRY J. CUPPER,
Notary Public.

The above affidavit formed a part of the complainants' testimony and was marked "Exhibit Staib's Original Affidavit, Geo. W. Bright, notary public, Oct. 12, '88."

Affidavits of James Carroll.

STATE OF NEW JERSEY, }
County of Essex, } *ss:*

James Carroll, of full age, being duly sworn, on his oath deposes and says: That one P. H. Gunckel, representing himself as attorney for the Columbia Milling Company, of Minneapolis, Minnesota, called on this deponent and secured an affidavit from him stating that he purchased a brand of flour called "Columbia." The affidavit should have read "Columbia patent," and deponent instructed said attorney to add to Columbia the word patent, which was not done, and deponent considers the word patent on flour bought from W. W. Alcorn & Co., of Philadelphia, Pa., as much the brand 285 as the word Columbia, it being in large print like the word Columbia. The flour was bought as Columbia patent, billed as Columbia patent, and sold as Columbia patent.

Deponent further says that since making the affidavit to the Columbia Milling Company he has disposed of all the Columbia patent he had at that time at a profit and has bought more; and that had he allowed the second car to have had as much age as the first car he would have had no reason to have rejected the third car.

JAMES CARROLL.

Sworn and subscribed before me at Newark, this fifth day of May, A. D. 1888.

[SEAL.]

PHILIP SOMMER,
Notary Public of N. J.

STATE OF NEW JERSEY, }
County of Essex, } *ss:*

James Carroll, being duly sworn, deposes and says:

That he is a flour dealer at 46 Market street, in the city of Newark. That he buys flour *flour* from William W. Alcorn & Co., of the city of Philadelphia. That he has purchased from them flour branded "Columbia patent." That the said flour was not represented as the flour of the Columbia Milling Company, and was not purchased by this deponent as such flour. That he was not induced to buy it supposing it to be the flour of the Columbia Milling Company. That he never heard of the Columbia Milling Company, never purchased any of their flour, and never saw any of it. That one P. H. Gunckel, representing himself as attorney for the said Columbia Milling Company, called on this deponent, and while trying to secure an affidavit from him, that he (the said deponent) was misled into buying the Columbia flour of William W. Alcorn 286 & Co., thinking it was the flour of the Columbia Milling Company, told this deponent that William W. Alcorn & Co. picked this flour up at different places, and branded it "Columbia."

All of which facts are true to the best of deponent's knowledge and belief.

JAMES CARROLL.

Sworn and subscribed to before me, this fifth day of May, A. D. 1888.

[SEAL.]

PHILIP SOMMER,
Notary Public of New Jersey.

Philadelphia Market Report.

Wednesday, January 16, 1889.

Daily Review.

Flour and meal.

Winter patent, fair to choice	$5.40	@ 6.00
Minnesota, clear	4.25	@ 5.00
Do. straight	5.12½	@ 5.85
Do. patent	6.00	@ 6.90

287 And afterwards, to wit, on the 25th day of October, A. D. 1889, come the parties aforesaid, by their solicitors aforesaid, and this cause being called for argument on final hearing and having been argued by counsel for the respective parties, and the court, not being fully advised in the premises, takes further time to consider thereof.

And afterwards, to wit, on the 29th day of October, A. D. 1889, come the parties aforesaid, by their solicitors aforesaid, and the court, being now fully advised in the premises, files the following opinion, to wit:

288 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

COLUMBIA MILL CO.
vs.
ALCORN.

BUTLER, *J.:*

The plaintiff claims an exclusive right to the word "Columbia" in brands for flour barrels, and charges the defendant with violating this right and also with imitating his brands in which the word is used.

We do not think he is sustained by the proofs. The exclusive right claimed is not satisfactorily shown. The word "Columbia" is popular and in common use for many purposes. That it should have been adopted long ago in branding flour barrels is quite 289 probable, and the testimony seems to show that it was both in the eastern and western sections of this country. If it be said the defendants' testimony in this respect is not as full as it might be the same may be said of the plaintiff's. The defendant went far enough to put the plaintiff to further proof. No more need be said respecting this branch of the case.

Flour brands are so numerous (nearly every miller and dealer having his own) and the general shape and style so similar, in consequence of their use on similar packages (barrels), that purchasers must necessarily observe them with some care to distinguish one from another; a passing glance cannot be relied upon, and we must suppose is not. In this respect the case differs from those in 290 which trade-marks are ordinarily involved. Looking at the plaintiff's brand and that of the defendants, which is said to resemble it, with the attention necessary to discriminate between the thousands of flour brands in common use, the difference must be seen immediately, even by the most inattentive buyer. The two or three witnesses who say they were misled must have been especially unobservant.

The bill must be dismissed with costs.

Cir. J. McKennan concurs.

(Endorsed:) 14. April sess., 1888. C. C. U. S., E. D. of Pa. Columbia Mill Co. *vs.* Alcorn *et al.* Opinion. Filed Oct. 29, 1889.

291 And afterwards, to wit, on the 6th day of November, A. D. 1889, the court enters the following decree, to wit:

In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the 3rd Circuit. In Equity.

Columbia Mill Co.
vs.
W. W. Alcorn *et al.*

And now, to wit, this 6th day of November, A. D. 1889, this cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed that the bill of complainants be dismissed with costs.

(Endorsed:) No. 14. April sess., 1888. U. S. C. C. Columbia Mill Co. *vs.* Wm. W. Alcorn *et al.* Decree. Filed Nov. 6, 1889. Alcorn, Johnson, att'ys for def't.-

292 And afterwards, to wit, on the 25th day of February, A. D. 1890, the complainant, by its solicitors, come into court here and prays an appeal to the Supreme Court of the United States in the words and figures following, to wit:

In the Circuit Court of the United States, Eastern District of Pennsylvania. In Equity.

The Columbia Mill Co.
vs. } April Sess., 1888. No. 14.
Alcorn *et al.*

And now, to wit, this 25th day of February, A. D. 1890, counsel for complainant appears in open court and prays an appeal from the decree of this court, dated November 6, 1889, to the Supreme Court of the United States, and the same is allowed, with security in the sum of five hundred dollars.

293 (Endorsed:) U. S. circuit court, E. dist. of Penna. Columbia Mill Co. *vs.* Alcorn *et al.* Allowance of appeal and fixing of security. Filed Feb. 25, 1890. Strawbridge & Taylor, sol'rs & of counsel for complainant.

294 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

The Columbia Mill Co.
vs.
William W. Alcorn and Samuel Alcorn, Trading as W. W. Alcorn & Company. } No. 14. April Sess., 1888. In Equity.

Know all men by these presents that we, The Columbia Mill Company of Minneapolis, Minnesota, as principal, and The Equitable Trust Company of Philadelphia, Pennsylvania, as surety, are held and firmly bound unto the above-named William W. Alcorn and Samuel Alcorn in the sum of five hundred dollars, to be paid to the said William W. Alcorn and Samuel Alcorn, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our respective heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fourteenth day of March, A. D. 1890.

Whereas lately, at a circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, in a suit depending in the said court between The Columbia Mill Company and William W. Alcorn and Samuel Alcorn, copartners as W. W. Alcorn and Company, a final decree was rendered against the said The Columbia Mill Company, and the said The Columbia Mill Company having taken an appeal, which appeal has been allowed by the said circuit court, to the Supreme Court of the United States to reverse the said decree in the aforesaid suit:

295 Now, the condition of this obligation is such that if the said The Columbia Mill Company shall prosecute its said appeal to effect and answer all damages and costs if it fail to make its appeal good, then this obligation to be null and void; otherwise to remain in full force and virtue.

COLUMBIA MILL CO., [CORPORATE SEAL.]
E. ZEIDLER, *Gen'l Manager & Treasurer.*
THE EQUITABLE TRUST COMPANY,
[CORPORATE SEAL.]
WM. F. HARRITY, *President.*

Attest: F. J. JOHANN, *Secretary.*

Sealed and delivered in the presence of—
F. NORMAN DIXON.
LEWIS ALTMAIER.
CLAUS RUYTER,
NILS FOSEN,
As to signature of Columbia Mill Co.

Surety approved.

WM. BUTLER, *J.* Judge.

[Endorsed:] No. 14. April sess., 1888. Circuit court United States. The Columbia Mill Co. *vs.* Alcorn & Co. Bond surappeal. Filed April 7, 1890.

296 THE UNITED STATES OF AMERICA, *ss:*

To William W. Alcorn and Samuel Alcorn, trading as W. W. Alcorn and Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the east-

n district of Pennsylvania, in the third circuit, wherein The Co-
mbia Mill Company is appellant and you are appellee-, to show
use, if any there be, why the decree rendered against said appel-
nt, as in said appeal mentioned, shall not be corrected and why
eedy justice should not be done to the parties in that behalf.

Witness my hand this 23rd day of May, in the year of our Lord
e thousand eight hundred and —.

WM. BUTLER, *Judge.*

Service accepted and clerk will please enter my appearance for
ppellees.

JOHN G. JOHNSON,
Att'y for Appellees.

97 United States of America, *Eastern District of Pennsylvania,* } *sct:*

I, Samuel Bell, clerk of the circuit court of the United States of
merica for the eastern district of Pennsylvania, in the third cir-
uit, do hereby certify the foregoing to be a true and faithful copy
f the original pleas and proceedings in the case of The Columbia
ill Company *vs.* William W. Alcorn and Samuel Alcorn, trading
s W. W. Alcorn and Company, No. 14, April session, 1888, on file
nd now remaining among the records of the said court in my
ffice.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 20th day of May, in the year of our Lord one thousand eight hundred and ninety, and of the Inde-
endence of the United States the one hundred and fourteenth.

Seal U. S. Circuit Court,
E. D. Pennsylvania.

SAMUEL BELL,
Clerk of C. C.

Endorsed on cover: Case No. 14,051. E. Pennsylvania C. C. U. S.
o. 357. The Columbia Mill Company, appellant, *vs.* William W.
lcorn and ~~James~~ Samuel Alcorn, trading as W. W. Alcorn & Company.
iled June 10, 1890.